Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC 20540

In the Matter of	)	
	)	**Docket No. 2005-1 CRB DTRA**
Digital Performance Right in Sound Recordings and Ephemeral Recordings	)	

AMENDED INTRODUCTORY STATEMENT OF COLLEGIATE BROADCASTERS, INC.

Collegiate Broadcasters, Inc. ("CBI"), pursuant to the Order of the Copyright Royalty Board issued February 2, 2006, hereby submits this Amended Introductory Statement to replace in its entirety, with the exception of the three appendices to the original filing, the previously-submitted "Direct Statement of Collegiate Broadcasters, Inc.," dated October 27, 2005.

I. Experts Proffered by Collegiate Broadcasters, Inc.

CBI offers the testimony of two experts in the field of student-operated electronic media associated with colleges and universities, including extensive experience with Webcasting transmissions of student-produced programming by educational institutions.

A. William C. Robedee.

William C. Robedee is employed by William Marsh Rice University of Houston, Texas, as the general manager of student-operated radio station KTRU and staff adviser for campus cable television station RTV-5. At the time of CBI's original filing, Mr. Robedee served as chair of the organization; he presently serves on the CBI Board of Directors as the Immediate Past Chair. Mr. Robedee formerly served as chair of the Broadcast Committee of College Media Advisers ("CMA"). He has actively participated throughout the separate-but-related rulemaking

proceeding addressing statutory notices of use of sound recordings on behalf of CBI. Mr. Robedee has been a frequent writer, speaker, and news source on the general topic of student-operated electronic media, and on the specific subject of the statutory license at issue in this proceeding. His testimony will address the characteristics of student-operated station KTRU, as an Educational Station marketplace user of this statutory license, as well as his more generalized experiences over 21 years with student-operated services nationwide currently or prospectively making use of this statutory license. Additionally, his testimony will analyze benchmarks suitable to this proceeding for establishing royalty rates and terms appropriate for student-operated digital audio services affiliated with schools, colleges, or universities ("Educational Stations").

B. Joel R. Willer.

Joel R. Willer is employed by the University of Louisiana at Monroe as a tenured assistant professor of mass communications and the faculty supervisor of student-operated radio station KXUL. Prof. Willer has fulfilled leadership roles in both CBI and CMA, and has received award recognition from CBI, CMA, and the Broadcast Education Association. He has actively participated throughout the rulemaking proceeding addressing statutory notices of use of sound recordings. Prof. Willer has been a frequent writer and speaker on the general topic of student-operated electronic media, and on the specific subject of the statutory license at issue in this proceeding. His testimony will address the characteristics of student-operated station KXUL, as an Educational Station marketplace user of this statutory license, as well as his more generalized experiences over 29 years with student-operated services nationwide currently or prospectively making use of this statutory license. Finally, his testimony will analyze

benchmarks suitable to this proceeding for establishing royalty rates and terms appropriate for Educational Stations.

II. Analysis of Educational Stations in Relation to Other Users of the Statutory License.

In their respective testimonies, Mr. Robedee and Prof. Willer each analyze the characteristics of Educational Stations to determine how these services might differ from other services subject to the statutory licenses, in order to ascertain how these characteristics might factor into the depiction of the Educational Station willing buyer in a theoretical marketplace. These experts describe in their testimony typical Educational Stations' revenue, resources, operational structure, programming missions, and amount of utilization of copyrighted material subject to the statutory license.

Each CBI expert notes that Educational Stations have been established as a distinct subgroup of Section 118 statutory licensees under 37 C.F.R. § 253.5. CBI's experts also observe that the previous Copyright Arbitration Royalty Panel ("CARP") separately addressed non-CPB broadcasters not represented by the National Religious Broadcasters Music License Committee, which would include Educational Stations.

CBI's experts additionally each state that all Educational Stations, even those not simulcasting facilities licensed by the Federal Communications Commission, should be included in the definition of this distinct class of services.

III. Analysis of the Previous Rate Determination for the Statutory License.

In their respective testimonies Mr. Robedee and Prof. Willer each review the previous CARP rate recommendation and the final determination by the Librarian. The CBI experts conclude that the record of the previous determination specifically notes a lack of information for services such as Educational Stations. Mr. Robedee and Prof. Willer conclude that the previous

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https://archive.org/details/cbi-statement

determination is not indicative of a hypothetical marketplace rate to which a willing Educational Station buyer would come to agree. CBI's experts additionally each cite statutory notices of use by Educational Stations as terms associated with royalty payment not adequately addressed in the prior proceeding.

IV. Analysis of Prospective Royalty Metrics for the Statutory License.

Mr. Robedee and Prof. Willer each analyze a variety of prospective royalty metrics in the specific context of Educational Stations. Each expert concludes that some metrics are categorically not appropriate for Educational Stations because of the not-for-profit status of these services. The experts rule out other metrics because they could not be economically or reasonably implemented for the level of utilization of copyrighted works characterizing Educational Stations. CBI's experts unanimously conclude that a flat-fee royalty metric would be most appropriate for Educational Stations.

Further, each CBI expert specifically examines the cost and burden of statutory reports of use of sound recordings for the Educational Station willing buyer in the theoretical marketplace. The experts conclude that some royalty metrics necessitate greater degrees of recordkeeping in order to effectuate royalty payment than would be the case with other royalty metrics. CBI's experts unanimously deduce that the per-song, per-listener metric adopted by the Librarian under the previous determination creates the expectation for requirements for reports of use of sound recordings exceeding what is reasonable for the Educational Station willing buyer to produce and for copyright owners to process, with each expert citing a number of reasons for their conclusions. The experts each suggest that, for Educational Stations, a flat-fee royalty metric would provide for the payment of royalties with minimal transactional costs each for these services and for copyright owners.

V. Analysis of Benchmarks for the Statutory License.

In their testimonies, CBI's two experts use different precedential rates to individually ascertain rate benchmarks for this statutory license, as to be applied to Educational Stations.

Mr. Robedee looks at a previous CARP determination for Section 118 royalties paid by the Corporation for Public Broadcasting on behalf of certain radio and television broadcasters. Rates from that determination are compared to Section 118 royalties paid by Educational Stations to establish a ratio then applied to the previous determination for royalties under Sections 112 and 114 of the Copyright Act. Mr. Robedee concludes that Educational Stations should pay a flat-fee annual royalty not to exceed $126.31, provided that the notice of use requirements do not exceed precedential regulations previously specified in 37 C.F.R. § 253.5(e).

Prof. Willer reviews the only performance royalty agreements, to his knowledge, voluntarily entered into in the marketplace with Educational Stations: campus agreements offered by each of the three musical works rights societies, which now include performance rights for Web audio streaming. He proposes to use the rate differential between preceding campus performance agreements not inclusive of the Web audio streaming rights and the newer agreements which do include such rights. This differential would then be applied to average national campus enrollment figures to derive a flat-fee royalty applicable to all Educational Stations. He does not at this time offer a specific value for this flat-fee royalty, due to uncertainties of costs and burdens for statutory reports of use of sound recordings and other factors. Prof. Willer separately addresses the issue of a minimum fee, as required by the statute, and he concludes the $85 annual statutory royalty paid to SESAC by Educational Station over-the-air broadcasters satisfies the criteria established by the previous CARP for the minimum fee.

VI. CBI's Requested Royalty Rate.

In the effort to expedite the resolution of these proceedings CBI proposes, for the specific Educational Station sub-class of services providing digital performances of sound recordings under Sections 112 and 114 of the statute, a flat-fee annual royalty not to exceed $175, applicable to all types of Educational Stations, with accompanying regulations for statutory reports of use of sound recordings strictly paralleling the language of 37 C.F.R. § 253.5(e).

Certification

Pursuant to the requirements of 37 C.F.R. § 350.4(e)(2), CBI is not represented by counsel in this proceeding and the signature below constitutes a certification that, to the best of my knowledge and belief, there is good ground to support this document, and that it has not been interposed for purposes of delay.

Dated: February 16, 2006

Respectfully submitted,

By: ____________________
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CERTIFICATE OF SERVICE

I, William C. Robedee, hereby certify that a copy of the foregoing AMENDED INTRODUCTORY STATEMENT OF COLLEGIATE BROADCASTERS, INC. has been served upon the parties named below in accordance with 37 CFR § 350.4(h) this 8th day of February, 2006.

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William C. Robedee

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C. 20540

In the Matter of: **Rate Setting for the Digital Performance Right in Sound Recordings and Ephemeral Recordings**	**Docket No. 2005-1 CRB DTRA**

DIRECT STATEMENT OF COLLEGIATE BROADCASTERS, INC.

Collegiate Broadcasters, Inc. ("CBI"), pursuant to the Order of the Interim Chief Copyright Judge issued March 24, 2005, hereby submits to the Copyright Royalty Board ("Board") its direct statement in the above captioned proceeding. CBI filed a Petition to Participate and a Notice of Intent to File a Written Direct Statement prior to the submission of this direct statement.

I. Introduction.

CBI is an organization that works with, supports the efforts of and represents students involved in electronic student media, including radio, television, webcasting, and other emerging technologies; ensures a commitment to education and the student pursuit of excellence through active involvement in electronic media; promotes cooperative efforts between itself and other national, regional, and state media

organizations; facilitates the discussion of issues related to student-operated electronic media; and other community oriented programs.

CBI's membership consists of university and college stations from around the nation and the thousands of students that operate those stations. CBI's activities are all conducted and supported by volunteers that emerge from member stations. CBI's Directors are elected from the membership, by the membership to voluntarily serve two-year terms if they are staff or faculty and a one year term, if a student.

CBI's members have a distinct and intense interest in this proceeding. As will be discussed in much greater detail in the expert testimony William C. Robedee and Joel R. Willer incorporated with this filing and *infra*, that without a true arms-length negotiated settlement that the Board will need to define a new class of service, Educational Stations,[1] and develop new rates and terms – inclusive of recordkeeping and reports of use – for this distinct, readily definable, and historically recognized group.

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[1] For the purposes of this direct statement an educational station is directly operated by, or is affiliated with and officially sanctioned by, and the nonexempt digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a "public broadcasting entity" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396. Further, these services are exempt from taxation under section 501 of the Internal Revenue code, have applied for such exemption, or are operated by a state or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

II. Educational Stations are a Distinct Sub-Group, that were not Represented in the Previous Rate Setting Arbitration.

The report of the Copyright Arbitration Royalty Panel ("CARP"), which formed the basis of the subsequent statutory royalty rates and terms for digital performances of sound recordings, contained absolutely no record of the characteristics or concerns of Educational Stations.

Educational Stations are different in purpose and composition than any service presenting evidence in the previous proceeding. The revenue and profit status of Educational Stations is different than any service participating in the foregoing proceeding. The amount of utilization of relevant copyrighted material is different for Educational Stations than for any prior participant. In most every characteristic that might be significant to a willing buyer in a theoretical marketplace, Educational Stations are distinct from willing buyers portrayed in the earlier proceeding.

Each of the experts presented here by CBI testify in detail regarding the characteristics of Educational Stations, including specific detail of two individual stations and generalizations of Educational Stations at large. These witnesses contrast vividly the differences of Educational Stations from the services represented in the CARP proceeding. Additionally, these witnesses cite precedent for distinguishing Educational Stations from other services; in particular, distinguishing these stations from other noncommercial services. These witnesses also provide citations of the absence in the previous record of adequate consideration of the Educational Station buyer.

Based upon the explanations of the Written Direct Testimonies of the expert witnesses appended hereto, this Board must determine that Educational Stations are a class of service distinct from commercial services and distinct from other noncommercial services, and that Educational Stations were not represented in the previous rate setting proceeding. CBI's intention is that this omission not be repeated here.

III. The Previous Rate Determination was not based on Evidence of What a Willing Educational Station, as a Buyer Would Pay.

The charge of this Board, as was also the case for the previous panel, is the determination of the rates and terms upon which, in a theoretical marketplace, a willing seller and a willing buyer would come to agree. It should go without saying that if information regarding a sufficiently distinct buyer has not been presented for such an evaluation, the determination cannot adequately reflect the circumstances of such a buyer, as is required by the statute[2]. Because, as our witnesses have presented, this was the precise case in the previous proceeding, this Board must now start anew to consider this fresh evidence of the Educational Station buyer, in order to reach its own determination of marketplace rates and terms. The previous determination, though the panel report on which it was based struggled mightily to do so, failed to establish a marketplace rate and terms to which a willing Educational Station buyer would agree. The Board should consider the distinction between a theoretical marketplace rate, such as the rate established by the Librarian, and a license rate actually used in the marketplace.

To CBI's knowledge, no Educational Station has made use of the rate established by Librarian's determination. This Board therefore should not now be restrained by the rates and terms presented in a record devoid of crucial facts, because building upon the failure of the previous proceeding would frustrate the fundamental charge of this Board.

IV. Establishing a Royalty Metric Appropriate for Educational Stations.

Once again, the former panel was constrained in making its determination by the limited scope of the evidence presented to it. As a result of this impediment, the panel was not necessarily presented with a full complement of potential royalty fee metrics upon which to base its rate determination, particularly one that would most appropriately represent the outcome, in a theoretical marketplace, most representative of rates and terms acceptable to a hypothetical Educational Station buyer.

From the perspectives of CBI's members, the fee metric selected by the previous determination causes great harm because of the cascading complications caused in reaction to the choice of metric. The most dramatic among these harms is the proposed requirement for exhaustive and, in the particular case of Educational Stations, preventative statutory reports of use of that have been argued necessary in response to the chosen metric. The burden of the reports of use, as proposed, is detrimental both to the Educational Stations and to the value of the statutory licenses for these services. This is not to say that CBI and its members would find any requirement for reports of use of

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[2] 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B).

sound recordings to be objectionable, but only that this particular scheme, for Educational Stations, is beyond reason. Likewise, CBI does not argue the appropriateness of any certain form for notice of use requirement for services other than Educational Stations. CBI's witnesses present evidence of the argument that, because of attempts which have been made to require reports of use predicated on the so-called per-performance fee metric, the statutory licenses are devalued to such an extreme as to render that metric unworkable in the case of Educational Stations.

CBI's witnesses consider and evaluate several royalty fee metrics not part of the report by the CARP. Several of these options prove to be obviously inappropriate for Educational Stations. Only one royalty fee option prevails, through a preponderance of the relevant facts, as the most appropriate fee metric in the particular circumstance of Educational Stations. CBI does not argue that this royalty fee metric should be adopted by this Board as the standard for all services, but a royalty fee based on a flat-fee metric most clearly represents the license to which a willing Educational Station would agree.

V. Further Terms to be resolved.

Because a burdensome requirement the statutory notices of use of sound recordings so profoundly impacts the value of the digital performance license, that factor becomes an inextricable term requiring consideration in the instant proceeding. CBI's witnesses provide evidence to this effect, and also introduce other notable terms to be addressed in this proceeding.

CBI here presents further evidence, which continues its consistent position in the separate notice of use rulemaking proceeding, that the adoption of notice of use regulations cannot be appropriately resolved independently of a rate determination. This board should follow clear precedent and adopt for Educational Stations notice of use regulations for the digital performance of sound recordings precisely parallel to the language of 37 C.F.R. § 253.5(e).[3]

For Educational Stations, sound business practices nearly universally employed by educational institutions require proof of financial obligation, in the form of a vendor-supplied invoice, before payment can be made. Sound accounting practices require that the party generating documentation of the liability to pay should be separate from the party generating the request for the expenditure. Such financial billing is a common cost of doing business in the marketplace, and cannot be reasonably argued by a license administrator as being unduly costly – particularly upon the adoption of the flat-fee royalty metric we propose here, where all Educational Stations would pay the same amount. See the Robedee Direct Testimony for explanation of this issue. Additionally, the present license administrator/designated receiving agent has refused to provide receipts of payments made.

All Educational Stations should have access to a deferential rate, favorably distinguishing these services from all other noncommercial service as well as from the

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[3] *Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and

universe of commercial services. Educational stations not associated with a license broadcast station share the same characteristics that should qualify these services for a preferred rate, as has specifically been addressed in the Willer testimony.

VI. Determination of the Theoretical Marketplace Royalty Rate for Educational Stations.

The lack of voluntary licenses actually negotiated in the marketplace, specifically with an Educational Station buyer, makes unavailable any representative agreement to directly serve as a rate benchmark for this determination. There is no marketplace agreement, to CBI's knowledge, to be used to characterize the same Educational Station buyer, the same seller, same product, same right, and same medium as the Board is considering here. The previous panel expressed its strong preference for the use of such a benchmark, when available, but in the absence of such a reference agreement, this Board must base its determination upon the best available alternative. The alternative can only be a theoretical model constructed on upon licenses somewhat different than those under consideration here.

CBI's witnesses present separate theoretical models, one of which is based on the longstanding Section 118 statutory licenses that served to establish the non-CPB funded, noncommercial rates under the Librarian's determination, and the second is based upon voluntary campus musical works performance agreements. A striking conclusion from both witnesses is that the $500 minimum annual fee of the Librarian's prior

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SESAC shall not in any one calendar year request more than 10 stations to furnish such reports.

determination represents a confiscatory amount for the uses of sound recordings by Educational Stations, and therefore also represents an amount far exceeding the appropriate value for an annual flat fee for these stations. Both experts also conclude that the present 37 C.F.R. § 253.5(c)(3) musical works royalty payable to SESAC by noncommercial broadcast stations licensed to colleges and universities, $85, represents an amount greater than necessary to serve the purposes of a minimum annual fee, inclusive of both transactional costs and intrinsic value, while also allowing for net proceeds to be distributed to copyright owners.

CBI accepts this $85 amount as representative of the low boundary below which an Educational Station flat fee should not fall, because this amount satisfies the purposes of a minimum fee while providing a profit for the sellers. Even without settling on which of the suggested heoretical model to use to determine a specific amount for an Educational Station flat fee, CBI concludes that such a marketplace fee should be an amount greater than $85 and an amount far less than $500. The conclusions of our experts strongly suggest that the appropriate marketplace flat fee should be somewhere very near the lower extreme of this range.

The litigation of a precise amount of the theoretical marketplace flat fee is likely to require great expenditures of time and resources to pursue for copyright owners and performers, educational stations and this Board. Even after such great effort, the lack of a voluntarily negotiated and directly comparable agreement will result in a flat rate proposal greatly exptrapolated from the nearest comparable circumstances. In the effort

to expedite the resolution of these proceedings, as they apply to Educational Stations, CBI proposes a flat annual fee of $175 for Educational Stations. Our belief remains that such an amount greatly overstates the rate to which an educational station would come to agree.

The testimony of our experts demonstrates that this proposed flat-fee royalty should be more than adequate compensation for copyright owners and performers. The Willer testimony demonstrates that an $85 annual amount has precedent as a rate that would ensure that a license administrator's transactional costs are covered, while also providing reasonable remuneration for copyright owners.[4] The rate we propose here is approximately twice the amount supported by the Willer testimony, allowing for plentiful profit for the copyright owners and performers. Similarly, the Robedee testimony, presented a theoretical model used to derive from the Librarian's determination for overall Section 112 and 114 non-CPB funded, noncommercial royalties a specific royalty for the sub-group of Educational Stations.[5] The $41.30 product of that model is more than four times the flat-fee royalty we propose here.

Neither of the ratios of these theoretical rates in comparison to the rate we propose is based on any precedent, nor do we intend that these ratios serve as precedent for use in other applications. The amount we propose merely represents CBI's sense of a figure comfortably exceeding a final flat-fee amount that might be reasonably derived

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[4] See Willer Direct Testimony at 48.

[5] See Robedee Direct Testimony at 90.

from the limited available rate precedents. Though we believe our proposal to be more than generous and that Educational Stations would by its application pay above a theoretical marketplace value for the use of sound recordings by these services, we consider the amount of overpayment to not be worth trifling over, by copyright owners and performers, by this Board, and by Educational Stations themselves.

VII. Conclusion.

For the reasons stated here and in the direct testimony of our witnesses, the Board should adopt, for the specific Educational Station sub-class of services providing digital performances of sound recordings under Sections 112 and 114 of the statute, a flat-fee annual royalty, not to exceed $175, applicable to all types of Educational Stations as that term has been used here, accompanying regulations for statutory reports of use strictly paralleling the language of 37 C.F.R. § 253.5(e), and other terms discussed herein.

Dated: October 27, 2005

Ron Bland, Vice-Chair
Collegiate Broadcasters, Inc.

Appendix I

Voluntary Musical Works Campus Performance Agreements for ASCAP, BMI and SESAC

Acct# 0382360

BMI® MUSIC
PERFORMANCE
AGREEMENT

College / University

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LI-02/12-58

One Tier

1. DEFINITIONS

(a) **"LICENSEE"** as used herein shall include the named institution and any of its constituent bodies, agencies, or organizations which maintain a substantial nexus to the named institution and/or over which the named institution has control or authority, including, but not limited to, fraternities, sororities, social clubs, and other organizations located on or off the LICENSEE's campus.

(b) **"Premises"** shall include LICENSEE's campus(es) and any site located off LICENSEE's campus(es) which has been engaged for use by LICENSEE, including, but not limited to, those locations where college groups such as bands or choruses perform as part of their nonprofit, community outreach and educational activities, provided that such events are not promoted or sponsored by a third party. However, in the event LICENSEE has a pecuniary interest in an establishment or property which is not directly related to LICENSEE's educational purposes or where the intended primary purpose of such establishment or property is not for the use of LICENSEE's students, at which establishment or property musical compositions are being performed publicly for purposes other than community outreach or education, it is specifically understood and agreed to by LICENSEE that this Agreement shall not apply to such other establishment or property.

(c) **"Full-time Students"** as used herein shall be the sum of (i) all full-time undergraduate and graduate students and (ii) one-third of all part-time undergraduate and graduate students. If during the Term of this Agreement, the method of converting part-time students to a full-time equivalency as indicated in subsection (ii) of this definition is changed from the Integrated Postsecondary Education Data System (IPEDS) or any superseding survey conducted annually by the U.S. Department of Education, such different method of conversion shall be deemed substituted in said subsection (ii) as of the effective Fall academic term.

(d) **"Compulsory Rate"** shall mean the fee for non-commercial educational radio stations established under Section 118 of the U.S. Copyright Act.

(e) **"Campus Radio Broadcasting Station"** shall mean and be limited to a non-commercial educational radio station that is not affiliated with NPR.

(f) **"Term"** shall mean the period commencing July 1, 2002 and ending June 30, 2007. "First Contract Year" shall mean the period commencing July 1, 2002 and ending June 30, 2003. Each subsequent period commencing July 1 and ending the following June 30 shall be referred to as an additional "Contract Year."

(g) **"Musical Attractions"** shall mean concerts, stage shows, variety shows, symphonies, operas, recitals, chamber music and other similar performances presented or promoted exclusively by LICENSEE.

(h) **"CPI Adjustment"** shall mean the difference in the Consumer Price Index (Urban, All Items), as determined by the United States Department of Labor, between July 2002 and July of the specified Contract Year.

(i) **"Orchestra"** shall mean a college orchestra which consists primarily of student performers who may be augmented by faculty, staff or other musicians. The Orchestra is offered by the institution to further education in music, including training musicians for professional careers or to better their general musical skills. The orchestra staff is employed by the college, which also has ultimate fiscal responsibility for the Orchestra, and is governed by the institution, a college-based steering committee or other similar body, and not a separate board of directors independent from the college.

(j) **"Web Site"** shall mean the Internet computer service comprising a series of interrelated web pages owned and/or operated by, or under the auspices of, LICENSEE and currently accessible via the Internet at the Uniform Resource Locator (URL) listed on Exhibit A or any other URL owned and/or operated by LICENSEE from which audio and/or audio-visual content containing musical works is made available to individuals; provided, however, that LICENSEE shall endeavor to keep Exhibit A current by providing BMI with an updated Exhibit A annually upon submitting its annual report pursuant to Paragraph 12, so that BMI will know to exclude them from its routine Internet licensing sales efforts. LICENSEE warrants and represents that each such Web Site is generally educational in nature or otherwise operated for the primary purpose of promoting the school and its resources to current and prospective students, faculty, staff, alumni, and the school community. LICENSEE further warrants and represents that, in the event that LICENSEE has a pecuniary interest in a Web Site which is not related to LICENSEE's educational or promotional purposes or where the intended primary purpose of such Web Site is not for the use of LICENSEE's current or prospective students, faculty, staff, alumni, or the school community, it is specifically understood and agreed to by LICENSEE that this Agreement shall not apply to such Web Site(s).

(k) **"Internet Transmissions"** shall mean all transmissions of content over the Internet to individuals who access such transmissions from LICENSEE's Web Site(s) and receive such transmissions via a personal computer or other device capable of receiving such transmissions.

(l) **"Locally Originated Programming"** shall mean television programming produced or which is inserted locally by LICENSEE or through an interconnect (an association of two or more cable systems for the purpose of distributing advertising or programming simultaneously) or otherwise originating by or on "LICENSEE's Cable Television System" including, without limitation, (i) programming on locally-originated channels, including advertising and promotional materials thereon; (ii) programming on public, educational and governmental ("PEG") access channels; (iii) public service announcements; (iv) programming on leased access channels; and (v) advertising and promotional materials inserted locally or through an interconnect by or on behalf of LICENSEE into national, regional or local cable programming services.

(m) **"LICENSEE's Cable Television System"** shall mean a cable television system, system of closed circuit distribution, MMDS, internet, broadband, including any linear feed via the Internet, broadband or other online service or other means of distribution which is owned and operated by LICENSEE and by which LICENSEE transmits Locally Originated Programming on LICENSEE's campus, except that it shall not include free over-the-air broadcast television.

(n) **"Intranet Transmissions"** shall mean transmissions of content that can only be accessed through an internal computer network accessible only to faculty, staff, students, and other members of the campus community who authenticate themselves through a secure access system and who access such transmissions via a personal computer or other device capable of receiving Internet Transmissions.

(o) **"Territory"** shall mean the United States, its Commonwealth, territories, and possessions.

2. GRANT OF RIGHTS

BMI hereby grants to LICENSEE for the Term of this Agreement a non-exclusive license to perform or cause the public performance by live or recorded means at LICENSEE's Premises or by means of Internet Transmissions or Intranet Transmissions in the Territory all of the musical works to which BMI shall have the right to grant public performance licenses, including, but not limited to, performances by or at:

- sporting events
- socials
- Musical Attractions
- Campus Radio Broadcasting Stations
- student unions
- college theater groups
- fitness centers
- classrooms
- fairs / festivals
- athletic facilities
- special events such as orientation and graduation
- fraternities / sororities
- college orchestras
- student bands

- "music-on-hold" (as that term is commonly understood) through LICENSEE's telephone system(s) at the Premises to persons connected to the Premises by telephone
- LICENSEE's Web Site(s), including webcasts of Campus Radio Broadcasting Stations
- LICENSEE's Cable Television System, with respect to Locally Originated Programming only

This license does not include:

(a) performances of music via any form of televised transmission, whether over-the-air broadcast, cable, satellite or otherwise, except performances via (i) LICENSEE's Web Site(s), subject to the limitations in Paragraph 1(j); (ii) LICENSEE's Intranet Transmissions; or (iii) LICENSEE's Cable Television System, with respect to Locally Originated Programming only;
(b) dramatic rights, the right to publicly perform dramatico-musical works in whole or in substantial part, the right to present individual works in a dramatic setting or the right to perform the music licensed hereunder in any other context which may constitute an exercise of the "grand rights" therein;
(c) performances of music by means of a coin operated phonorecord player (jukebox) or digital jukebox;
(d) Musical Attractions on the Premises promoted by outside promoters (which shall mean any person or entity other than LICENSEE);
(e) Musical Attractions occurring outside of the Premises, except as part of community outreach and educational activities; or
(f) performances by commercial radio stations.

This license is not assignable, and no rights other than those mentioned are included in this license.

3. EXAMINATION OF BOOKS AND RECORDS

BMI, upon giving reasonable notice to LICENSEE in writing, shall have the right to examine the books and records of account of LICENSEE which pertain solely to this Agreement and which may be necessary to verify any statements rendered and accountings made hereunder.

4. INDEMNITY

BMI agrees to indemnify, save harmless and defend LICENSEE, its officers and employees, from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance of any material licensed under this Agreement. Such indemnity shall be limited to works which are licensed by BMI at the time of LICENSEE's performances. BMI will, upon reasonable written request, advise LICENSEE whether specific musical works are available for performance, under this Agreement, if LICENSEE provides the title and the writer/composer of each musical work. LICENSEE agrees to give BMI immediate notice of any such claim, demand or suit, to deliver to BMI any papers pertaining thereto, and to cooperate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand or suit.

5. BREACH OR DEFAULT/ WAIVER

Upon any breach or default of the terms and conditions of this Agreement that continues for thirty (30) days after LICENSEE's receipt of written notice thereof, BMI may, at its sole option, cancel this Agreement. The right to cancel shall be in addition to any and all other remedies which BMI may have. No waiver by BMI of full performance of this Agreement by LICENSEE in any one or more instances shall be deemed a waiver of the right to require full and complete performance of this Agreement thereafter or of the right to cancel this Agreement in accordance with the terms of this Paragraph. In the event of such cancellation, BMI agrees to refund to LICENSEE any unearned license fees paid in advance to BMI by LICENSEE.

6. CANCELLATION BY LICENSEE

In the event LICENSEE ceases to operate as an institution of higher education, or where LICENSEE ceases the public performance of music licensed by BMI, LICENSEE may cancel this Agreement upon giving sixty (60) days notice in writing to BMI. The right to cancel shall be in addition to any and all other remedies which LICENSEE may have. In the event of such cancellation, BMI agrees to refund to LICENSEE any unearned license fees paid in advance to BMI by LICENSEE.

7. ARBITRATION

All disputes of any kind, nature or description not subject to the jurisdiction of the BMI Rate Court arising in connection with the terms and conditions of this Agreement shall be submitted to the American Arbitration Association in New York, New York for arbitration under its then prevailing rules, the arbitrator(s) to be selected as follows: Each of the parties hereto shall, by written notice to the other, have the right to appoint one arbitrator. If within ten (10) days following the giving of such notice by one party, the other shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon the third arbitrator, then either party may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered into any court having jurisdiction. Such award shall include the fixing of the costs, expenses and attorneys' fees of arbitration, which shall be borne by the unsuccessful party.

8. NOTICES

All notices, if any, shall be in writing and be deemed given upon mailing, when sent by United States certified mail sent to the party intended at its mailing address. Each party agrees to inform the other, in writing, of any change of address. Any such notice sent to BMI shall be to the attention of the Vice President, General Licensing Department at 10 Music Square East, Nashville, TN 37203. Any notice sent to LICENSEE shall be to the person signing this Agreement on behalf of LICENSEE or such other person as LICENSEE may advise BMI in writing.

9. OFFER OF COMPARABLE AGREEMENT

In the event that BMI, at any time during the Term of this Agreement, shall, for the same class and category as that of LICENSEE, issue licenses granting rights similar to those in this Agreement on a more favorable basis, BMI shall, for the balance of the Term, offer LICENSEE a comparable agreement.

10. MISCELLANEOUS

This Agreement constitutes the entire understanding between the parties with respect to the subject matter hereof and shall not be binding until signed by both parties. This Agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed by the parties. This Agreement, its validity, construction and effect, shall be governed by the laws of the State of New York. The fact that any provisions herein are found by a court of competent jurisdiction to be void or unenforceable shall not affect the validity or enforceability of any other provisions.

11. RESERVATION OF RIGHTS

The license granted in Paragraph 2 of this Agreement to publicly perform BMI music by means of Internet Transmissions or Intranet Transmissions is experimental in nature. Both parties hereby expressly reserve their right to re-evaluate the appropriateness of the fees and terms of the Agreement with respect to all such transmissions for periods following the Term.

12. FEES / REPORTING

In consideration of the license granted herein, LICENSEE agrees to pay BMI the following license fees:

(a) **TOTAL STUDENT FEE**

LICENSEE shall pay BMI a Total Student Fee derived from the "Per Student Fee" for each Contract Year. In no event shall the Total Student Fee for any Contract Year be less than the Minimum Annual License Fee. The Per Student Fee and Minimum Annual License Fee for each Contract Year is as follows:

Contract Year	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Per Student Fee	$0.238	$0.247	$0.266	2004-2005 fee adjusted by the CPI	2005-2006 fee adjusted by the CPI
Minimum Annual License Fee	$194	$201	$217	2004-2005 fee adjusted by the CPI	2005-2006 fee adjusted by the CPI

The Total Student Fee will be based upon the number of Full-time Students as defined in Paragraph 1(c) and shall be calculated as follows:

(i) The number of full-time undergraduate students is 6,373

(ii) The number of full-time graduate students is 453

(iii) The number of part-time undergraduate and graduate students is 1,778
which when divided by three (3), equals a full-time equivalency of 593

(iv) The total number of "Full-time Students" is therefore (total i, ii & iii) 7,419

which when multiplied by the Per Student Fee for the Contract Year equals the Total Student Fee of .... A. $ 1,765.72

For the First Contract Year, the number of Full-time Students as for all covered branch campuses shall be reported for the Fall 2002 academic term upon execution of this Agreement. The Total Student Fee due BMI pursuant to this Agreement for the First Contract Year shall be paid by LICENSEE to BMI on or before February 1, 2003. All license fees based upon the number of Full-time Students shall be computed to the nearest tenth of a cent and all minimums to the nearest dollar.

(b) **CAMPUS RADIO BROADCASTING STATION FEE**

LICENSEE operates Campus Radio Broadcasting Station(s), as defined in Paragraph 1(e) of this Agreement, the call letters of which are: KXUL. For the first Contract Year LICENSEE shall pay a license fee for said Campus Radio Broadcasting Station(s) which is derived from the current Compulsory Rate of $244.00 as follows:

(i) The total number of Campus Radio Broadcasting Stations is 1 which when multiplied by the Compulsory Rate of $244.00 equals a total Campus Radio Broadcasting Station(s) Fee of .... B. $ 244.00

For each additional year the Compulsory Rate shall be adjusted by the CPI Adjustment. For each Contract Year LICENSEE shall pay upon receipt of invoice, for each Campus Radio Broadcasting Station, a license fee derived from the Compulsory Rate.

(c) **CABLE LICENSE FEE**

LICENSEE operates a Cable Television System on which Locally Originated Programming is performed. The Cable License Fee is calculated by multiplying the total number of Full-time Students in Paragraph 12(a) (iv) by the Per Student Cable License Fee. The Per Student License Fee for each Contract Year is as follows:

Contract Year	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Per Student Cable License Fee	$.0525	$.0525	$.0525	2004-2005 fee adjusted by the CPI	2005-2006 fee adjusted by the CPI

Total Cable License Fee .... C. $ N/A

The Grand Total License Fee due BMI shall be the sum of the Total Student Fee plus the Campus Radio Broadcasting Station(s) Fee plus the Cable License Fee.

GRAND TOTAL LICENSE FEE (Boxes A, B and C).......... $ 2,009.72

(e) On or before November 1 of each year from 2003 through 2007, LICENSEE shall report to BMI, on forms to be supplied by BMI, the total number of Full-time Students as defined in Paragraph 1(c) and calculated in Paragraph 12(a) (iv) for the Fall academic term of the Contract Year, which will establish the license fee for the Second, Third, Fourth and Fifth Contract Years. In addition, LICENSEE shall report the call letters of its Campus Radio Broadcasting Station(s), whether it desires coverage for LICENSEE's Cable Television System, and such other information as BMI may reasonably require with regard to any Campus Radio Broadcasting Station(s). The license fee due BMI pursuant to the Agreement for the Second, Third, Fourth and Fifth Contract Years shall be paid by LICENSEE to BMI on or before the 20th day of January 2004, 2005, 2006, 2007.

13. REPORTING OF MUSICAL WORKS

For the purposes of royalty distribution to BMI's affiliated songwriters, composers and music publishers:

(a) All Campus Radio Broadcasting Station(s) licensed under the Compulsory Rate shall, upon written request from BMI made on not less than two (2) weeks notice specifying the prospective period to be covered by the request, agree to furnish BMI weekly lists of each station's performances of all musical works, indicating the compositions performed by title and composer or by such other convenient method as may be designated by BMI, and whether such Campus Radio Broadcasting Station's broadcast signal was also transmitted over the Internet; but such lists need not be furnished for more than two (2) weeks for each Contract Year of the Term of this Agreement;

(b) LICENSEE shall deliver to BMI for each calendar quarter, by the tenth (10th) day following the end of the calendar quarter, copies of any programs of the musical works presented by LICENSEE in its Musical Attractions or on LICENSEE's Web Site(s) during such quarter.

40 # -32-147

Programs prepared for audiences or for the LICENSEE's own use are to be included, and shall include the presentation of encores to the extent possible. Nothing contained herein shall be deemed to require LICENSEE to deliver material not otherwise prepared; and

(c) To assist BMI with the distribution of royalties to its affiliated songwriters, composers and music publishers, at BMI's request, and on forms to be supplied by BMI, LICENSEE will provide BMI true, accurate and complete lists of all production music libraries and composers directly hired by LICENSEE's Cable Television System to compose original music for programming licensed hereunder. At BMI's written request, LICENSEE will also provide lists of the channel line-up for LICENSEE's Cable Television System licensed hereunder as of the last day of each year (i.e., December 31) within the Term.

List of Additional Branch Campuses Covered Under This Agreement

(Enrollment figures should include all branch campuses that are covered under this Agreement)

Institution Name	Branch Address	FICE Code Number

Exhibit A

Web Site Name	URL
KXUL Radio	http://kxul.com

Attach List If More Space Required

PLEASE RETURN THIS ENTIRE SIGNED LICENSE AGREEMENT TO: BMI, 10 MUSIC SQUARE EAST, NASHVILLE, TN 37203

AGREEMENT

THIS AGREEMENT made and entered into on *(Date will be Entered By BMI Upon Execution)* JAN 10 2003 between BROADCAST MUSIC, INC., a New York corporation with its principal offices located at 320 West 57th Street, New York, N.Y. 10019, hereinafter referred to as BMI, and the entity described below and hereinafter referred to as LICENSEE:

ENTER LEGAL NAME: University of LA at Monroe ~~Northeast Louisiana Univ~~
(Legal Name of LICENSEE and Name of Institution)

ENTER 6-DIGIT FICE CODE NUMBER: 002020

PREMISES
A college, or university or other post-secondary institution of higher education with its principal offices at:

700 University Ave
(Street Address)
Monroe LA 71209
(City) (State) (Zip)
(318) 342-5211
(Telephone No.) (Fax No.)
(Contact Name) (Title)

MAILING ADDRESS
(If different from Premises address)

c/o Student Development
(Street Address)
Monroe LA 71209
(City) (State) (Zip)
(Telephone No.) (Fax No.)
(Contact Name) (Title)

TO BE COMPLETED BY AN AUTHORIZED REPRESENTATIVE OF LICENSEE

Richard Hod (for JEC)
Signature

James E. Cofer, Sr., President
Print Name / Title

FOR ADMINISTRATIVE USE ONLY
TO BE COMPLETED BY BMI
BROADCAST MUSIC, INC.

Thomas G. Annastas, Vice President

FOR BMI USE ONLY

0382360	0382360
Account No.	COID

BMI ® 1940

® BMI and the Music Stand symbol are registered trademarks of Broadcast Music, Inc.

NO CHECK

SESAC PERFORMANCE LICENSE FOR COLLEGES AND UNIVERSITIES

AGREEMENT made in New York by and between SESAC, Inc. ("SESAC"), a New York corporation, with offices at 55 Music Square East, Nashville, TN 37203 and

University of Louisiana at Monroe ("LICENSEE")
(Legal Name of Entity)

(Address) 700 University Ave Sub 201

(City, State, ZIP) Monroe, LA 71209

Telephone: ____________ Fax: ____________ E-mail: ____________

The parties hereto mutually agree as follows:

1. GRANT OF RIGHTS: Effective as of July 1, 2003 (the "Effective Date"), SESAC grants to LICENSEE, its constituent bodies, agencies or organizations over which LICENSEE has control or authority, including but not limited to fraternities, sororities, social clubs, and other organizations located on or off LICENSEE's premises which are operated for the benefit of LICENSEE, its faculty, staff, students or alumni, the non-exclusive right and license to publicly perform non-dramatic renditions of the musical compositions, the performance rights to which SESAC controls and/or is authorized to license during the Term of this Agreement (the "Compositions") as follows:

A. On LICENSEE's "Campus." As used herein, "Campus" shall mean the grounds and buildings owned or controlled by LICENSEE, including classroom and administration buildings, auditoriums, arenas, stadiums, gymnasiums and student and faculty facilities. Campus shall also include any site located off LICENSEE's premises which is used, under the auspices of LICENSEE, by its faculty, staff, students, or alumni. As used herein, "Campus" shall specifically include transmissions of music-on-hold (as that term is commonly understood), through LICENSEE's telephone system at its premises, to persons connected to its premises by telephone.

SESAC

B. By means of "Internet Transmissions," "Intranet Transmissions" and from LICENSEE's "Web Site(s)." As used herein, "Internet Transmissions" shall mean transmissions over the Internet to individuals who access such transmissions from LICENSEE's Web Site(s) and receive such transmissions, including webcasts of radio stations owned and operated by LICENSEE, via a personal computer or other device capable of receiving such transmissions. As used herein, "Intranet Transmissions" shall mean transmissions that can be accessed only through an internal computer network accessible only by faculty, staff, students and other members of LICENSEE's educational community who authenticate themselves through a secure access system and who access such transmissions via a personal computer or other device capable of receiving such transmissions. As used herein, "Web Site" shall mean an Internet computer service comprised of a series of interrelated web pages owned and/or operated by, or under the auspices of LICENSEE and accessible to the general public via the Internet.

C. By transmissions of "Locally Originated Programming," distributed or supplied by LICENSEE through the "Cable Television System." As used herein, "Locally Originated Programming" shall mean audio or audio-visual programming that is locally produced by LICENSEE, or that is inserted on behalf of LICENSEE locally or through an interconnect or otherwise originated by, for, or on the Cable Television System. Locally Originated Programming includes, but is not limited to, (a) programming on locally-originated channels programmed by the Cable Television System, including advertising and promotional materials thereon; (b) programming on public, educational and governmental ("PEG") access channels; and (c) advertising and promotional materials inserted locally or through an interconnect by or on behalf of LICENSEE into national, regional, or local cable programming services. As used herein, "Cable Television System" shall mean the cable television system, system of closed circuit distribution, multipoint microwave distribution system (MMDS), Internet, broadband, or other online service or other means of distribution which is owned and operated by LICENSEE and by which LICENSEE transmits Locally Originated Programming to LICENSEE's premises.

Account No: 08-17-00034 I.D.# 3794

2. LIMITATIONS OF RIGHTS.

A. Except as provided in Paragraph 1. above, LICENSEE shall not have the right to broadcast, televise, or otherwise transmit, record, film, videotape or otherwise reproduce or capture by any means, medium, method, device or process now or hereafter known, any of the musical compositions and performances thereof licensed hereunder, nor shall LICENSEE have the right to grant to others any such right.

B. The license granted herein shall not include dramatic rights, the right to perform dramatico-musical works in whole or in part, the right to present individual Compositions in a dramatic setting or the right to use the Compositions in any other context that may constitute an exercise of the Compositions' "grand rights," as such term is commonly understood.

C. SESAC shall have the right to withdraw from the scope of this license, upon written notice, the right to perform any musical composition licensed hereunder as to which any action has been threatened, instituted, or a claim made that SESAC does not have the right to license the performance rights in such composition.

D. Campus, as used herein, shall specifically exclude any establishment, property, or activity in which LICENSEE has a commercial interest where the primary purpose of such establishment, property, or activity is not for the use of LICENSEE's students, faculty, or alumni, but rather is for purposes unrelated to licensee's educational mission and community outreach.

E. Campus, as used herein, shall specifically exclude any areas of the Campus during such periods that the areas are engaged by an unrelated third party other than LICENSEE, its constituent bodies, agencies or organizations over which LICENSEE has control or authority, such as an outside concert promoter or sports team or league.

F. The license granted herein shall specifically exclude performances of the Compositions (i) which are part of a commercial background music service (e.g. Muzak), originating from any location including the Campus, regardless of the means by which such performances are transmitted on or to the Campus, or (ii) by coin-operated phonorecord players ("jukeboxes"), as defined in 17 U.S.C. § 116.

G. Web Site, as used herein, shall specifically exclude any web page that is operated by any non-commercial educational broadcast station affiliated with NPR, PBS, or CPB.

H. Cable Television System, as used herein, shall specifically exclude free over-the-air broadcast television.

I. This Agreement is limited to the United States, its territories and possessions and the Commonwealth of Puerto Rico.

J. All rights not expressly granted herein are reserved by SESAC.

3. TERM OF LICENSE.

A. The term of this Agreement shall be for an initial period that commences upon the Effective Date and continues through June 30, 2007 (the "Initial Period"). Thereafter, this Agreement shall automatically continue in full force and effect for successive additional periods of one (1) year ("Renewal Period(s)"). SESAC and /or LICENSEE shall have the right to terminate this Agreement as of the last day of the Initial Period or as of the last day of any Renewal Period(s) upon providing written notice to the other party by certified mail, return receipt requested, at least thirty (30) days prior to the commencement of any Renewal Period(s). The Initial Period and Renewal Period(s) are sometimes collectively referred to herein as the "Term."

B. Notwithstanding anything to the contrary contained herein, SESAC shall have the right to terminate this Agreement upon thirty (30) days written notice by reason of any law, rule, decree, or other enactment having the force of law, by any authority, whether federal, state, local, territorial or otherwise, which shall result in substantial interference in SESAC's operation or any substantial increase in the cost of conducting its business.

4. LICENSE FEE.

A. In consideration of the grant of rights herein, LICENSEE shall pay to SESAC the annual "License Fee" then in effect in accordance with the "Fee Schedule" set forth in Schedule "A" attached hereto.

B. Provided that SESAC has issued invoice statements to LICENSEE, SESAC shall have the right to impose a late payment charge of one and one-half percent (1.5%) per month for any License Fee payment that is more than forty-five (45) days past due, unless by constitution or statute LICENSEE is exempt from any such charge whether applied directly or indirectly to LICENSEE. In the event that SESAC incurs any costs or fees in connection with the collection of any amounts past due to SESAC hereunder, then LICENSEE shall be responsible for paying such amounts to SESAC unless by constitution or statute LICENSEE is exempt from any such charge whether applied directly or indirectly to LICENSEE.

5. RIGHT OF VERIFICATION.

A. SESAC shall have the right on reasonable written notice, to examine during customary business hours, LICENSEE's books and records which pertain solely to this Agreement to such extent as may be necessary to verify any and all payments, statements, computations and reports rendered and accountings made or required hereunder. All data and information brought to SESAC's attention as a result of any examination shall be treated as confidential.

B. LICENSEE hereby agrees to furnish quarterly to SESAC copies of any existing programs prepared for distribution to the audience or for the use or information of LICENSEE or any of its departments relating to musical compositions performed under the auspices of LICENSEE.

6. INDEMNITY.

SESAC agrees to indemnify, hold harmless and defend LICENSEE from and against claims, demands or suits that may be made or brought against LICENSEE with respect to the performance under this Agreement of any of the musical works which are licensed hereunder at the time of LICENSEE's performance thereof. LICENSEE agrees to give SESAC reasonable, prompt notice of any such claim, demand or suit, to deliver to SESAC any papers pertaining thereto, and to cooperate with SESAC with respect thereto. SESAC shall have full charge of the defense of any such claim, demand or suit. This paragraph shall not apply to the performance of any works that may be restricted under Paragraph 2.C. of this Agreement.

7. CONTRACT CONSTRUCTION; MISCELLANEOUS.

A. In the event LICENSEE fails to pay the License Fee when due or is otherwise in default of any other provision of this Agreement and has not cured such breach within thirty (30) days following SESAC's notice of such default, then SESAC shall have the right to terminate this Agreement in addition to pursuing any and all other rights and/or remedies available.

B. In the event of any termination of this Agreement, SESAC will refund to LICENSEE any unearned License Fees paid in advance.

C. This Agreement shall not be valid until accepted and executed in the name of SESAC by its authorized signatory. No waiver, addition or modification of this Agreement shall be valid unless in writing, executed with the same formality as this instrument. No waiver of any breach of this Agreement shall be deemed a waiver of any preceding, continuing, or succeeding breach of the same or any other provision of this Agreement. This Agreement shall be binding upon and inure to the benefit of the parties' legal representatives, successors, and assigns, but no assignment shall relieve the parties of their obligations under this Agreement.

D. This Agreement has been read and is understood by both parties and contains their entire understanding with regard to the subject matter. There are no representations, promises or covenants other than those contained herein. This Agreement supersedes and cancels all prior negotiations and understandings between SESAC and LICENSEE in connection with the subject matter herein as of the Effective Date. SESAC will apply any monies paid pursuant to any prior agreement for periods after the Effective Date to License Fees due hereunder.

E. Captions and titles are for the convenience of the parties and shall be given no effect in the construction or interpretation of this Agreement. If any part of this Agreement shall be determined to be invalid or unenforceable by a court of competent jurisdiction or by any other legally constituted body having the jurisdiction to make such determination, the remainder of this Agreement shall remain in full force and effect.

IN WITNESS THEREOF, the parties have caused this Agreement to be duly signed as of ______________________.
(Please insert today's date)

LICENSEE	**SESAC, Inc.**
BY: ______________________ (Please sign here)	BY: ______________________
______________________ (Type or print name)	______________________ (Type or print name)
TITLE: ______________________	TITLE: ______________________

Schedule "A"
COLLEGES AND UNIVERSITIES – 2003 - 2007

I. Fee Schedule/License Fee.

A. The annual License Fee shall be calculated based upon the following:

For the period July 1, 2003 through June 30, 2004

Base License Fee	Cable Television License Fee*
$0.089 multiplied by the "FTE," Minimum License Fee $180	Authorization included in Base License Fee

For the period July 1, 2004 through June 30, 2005

Base License Fee	Cable Television License Fee*
$0.092 multiplied by the "FTE," Minimum License Fee $190	$0.018 multiplied by the "FTE"

For the period July 1, 2005 through June 30, 2006

Base License Fee	Cable Television License Fee*
$0.097 multiplied by the "FTE," Minimum License Fee $198	$0.019 multiplied by the "FTE"

For the period July 1, 2006 through June 30, 2007

Base License Fee	Cable Television License Fee*
$0.103 multiplied by the "FTE," Minimum License Fee $205	$0.020 multiplied by the "FTE"

*payable only if LICENSEE has a Cable Television System

B. As used herein, "FTE" shall mean the "full-time student equivalency" of LICENSEE as of the previous fall academic term and shall include graduate and undergraduate "full-time equivalent students" as such term is used in the Integrated Post-Secondary Education Data System (IPEDS) conducted annually by the United States Department of Education or any superseding survey conducted by the Department of Education. Such different method of conversion shall be deemed substituted in this Agreement as of the effective fall academic term.

C. Upon execution of this Agreement, LICENSEE shall provide SESAC with a completed Schedule "B" indicating the name and address of LICENSEE's educational institution(s), FTE, and Cable Television System operations as of the Effective Date. Thereafter, in the event that the name or address of LICENSEE's educational institution(s) change; in the event that the current FTE has undergone a cumulative change of ten percent (10%) or more from that reported on Schedule "B;" or if LICENSEE commences operation of a Cable Television System, or ceases operation of a Cable Television System, LICENSEE shall submit a revised Schedule "B." License Fees will be adjusted effective the following July 1. SESAC retains the right to obtain or verify these figures through independent sources and adjust the License Fee accordingly.

D. LICENSEE shall pay the initial License Fee to SESAC within forty-five (45) days of billing therefor. The initial License Fee payment shall be a pro-rated amount calculated using the then current License Fee rate(s) from the Effective Date through the end of the current billing period. Subsequent payments shall be made annually in one (1) payment on or before the first day of January, for the billing period of July 1 through June 30 of each year of the Term. SESAC will issue invoice statements to LICENSEE at least fifteen (15) days prior to the date that payments are due.

E. On or before March 1, 2007, SESAC will enter into good-faith negotiations with the National Association of College and University Business Officers, American Council on Education, or similar industry representative regarding license terms and conditions and proposed license fees for periods beyond July 1, 2007. Such good-faith negotiations will conclude on or before April 15, 2007. Not later than June 1, 2007, SESAC will provide LICENSEE written notice of the Fee Schedule to be applied to all similarly situated colleges and universities for the period commencing July 1, 2007.

II. **This Schedule** is incorporated and made part of the Agreement. Unless otherwise indicated, all capitalized terms in this Schedule "A" shall have the same meaning as set forth in the Agreement.

SESAC
Schedule B

Report Period July 1, 2003 through June 30, 2004

Person Completing Form: ______________________ Title: ______________________

Phone Number: ______-______-__________ Fax Number: ______________________

Does the College/University have a Cable Television System*: Yes ___ No ___ E-Mail Address: ______________________

Educational Institution	Address	City	St	Fall 2003 FTE	Base Multiplier	Base License Fee**
					$0.089	

*No additional fee for this report period
** FTE times Base Multiplier, minimum annual fee $180

Billing Information

Please complete the following to ensure that invoices are forwarded to the correct department and are complete for processing

Attention: ______________________ Department: ______________________

Address: ______________________

City: ______________________ State: __________ Zip: __________

Vendor Identification Number assigned to SESAC: ______________________

SESAC Federal Identification Number : 13-1325220

SESAC Contact Information

55 Music Square East
Nashville, TN 37203
Phone: 615-320-0055
Fax: 615-321-6292
E-Mail:scarpenter @sesac.com

COLLEGES AND UNIVERSITIES LICENSE AGREEMENT (One Tier)

THIS AGREEMENT made and entered into this 1st DAY of JULY, 2003, by and between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, with its principal offices located at One Lincoln Plaza, New York, New York 10023, hereinafter referred to as "ASCAP", and RICE UNIVERSITY/PRES.OFF. MS-1, a College or University with its principal offices located at 6100 Main St Houston, TX hereinafter referred to as "Licensee".

WITNESSETH:

WHEREAS, ASCAP's writer and publisher members have authorized ASCAP to license, on a non-exclusive basis, nondramatic public performances of their copyrighted musical compositions; and

WHEREAS, Licensee is an institution of higher education and desires to perform publicly and nondramatically the copyrighted musical compositions in ASCAP's repertory during the period hereof; and

WHEREAS, the parties hereto agree that this Agreement is being entered into on a experimental and nonprejudicial basis, shall apply for the term of this Agreement only, and shall not be binding upon or prejudicial to any position taken by either of the parties for any period subsequent to the termination of this Agreement.

Now, therefore, the parties hereto mutually agree as follows:

1. Definitions

As used in this Agreement,

(a) The term "Licensee" shall include the named institution and any of its constituent bodies, agencies or organizations, including, but not limited to, any organization such as a fraternity, sorority, social club or other organization affiliated with Licensee and located on or off Licensee's campus, which is operated for the benefit of Licensee or its faculty, staff, students or alumni.

(b) The term "premises" shall include Licensee's campus(es) and any site located off Licensee's campus which has been engaged by Licensee for use by Licensee and any of its constituent bodies, agencies or organizations, including, but not limited to, those locations where college groups such as bands or choruses perform as part of their non-profit, community outreach and educational activities, provided that such events are not promoted or sponsored by a third party.

(c) The term "full-time student" shall be the sum of: (i) all full-time undergraduate and graduate students; and (ii) one-third of all part-time undergraduate and graduate students. If, during the term of this Agreement, the method of converting part-time students to a full-time equivalency as indicated in Subsection (ii) of this Paragraph is changed by the Integrated Post-Secondary Education Data System (IPEDS) or any superseding survey conducted annually by the Department of Education, such different method of conversion shall be deemed substituted in said Subsection (ii) as of the effective fall academic term.

(d) The term "musical attractions" shall mean concerts, shows, recitals, dances and other similar performances.

(e) The term "school year" shall mean the twelve month period commencing September 1 of any calendar year during the term hereof.

(f) The term "CPI adjustment" shall mean the difference in the Consumer Price Index, All Urban Consumers - ("CPI-U"), as determined by the United States Department of Labor, between the preceding July and July of the specified year.

(g) "Internet Site or Service" shall mean a site or service accessible via the Internet or a similar transmission facility from which audio content is transmitted to "Users" and from which Users may download or otherwise select particular musical compositions and that has either the principal Universal Resource Locator (URL) of rice.edu or any other URL operated or maintained by Licensee. "Users" means all those who access Internet Transmissions.

(h) "Internet Transmissions" shall mean all transmissions of content to Users from or through Licensee's Internet Site or Service, or from any other Internet site or service pursuant to an agreement between Licensee and the operator of the other Internet site or service, when accessed by means of any connection from Licensee's Internet Site or Service.

(i) "Locally Originated Programming" shall mean television programming produced or which is inserted locally by Licensee or through an interconnect (an association of two or more cable systems for the purpose of distributing advertising or programming simultaneously) or otherwise originating by or on "Licensee's Cable Television System" including, without limitation, (i) programming on locally-originated channels, including advertising and promotional materials thereon; (ii) programming on public, educational and governmental ("PEG") access channels; (iii) public service announcements; (iv) programming on leased access channels; and (v) advertising and promotional materials inserted locally or through an interconnect by or on behalf of Licensee into national, regional or local cable programming services.

(j) .. "Licensee's Cable Television System" shall mean a cable television system, system of closed circuit distribution, MMDS, internet, broadband, including any linear feed via t iternet, broadband or other online service or c means of distribution which is owned and operated by Licensee and by which Licensee transmits Locally Originated Programming on Licensee's campus, except that it shall not include free over-the-air broadcast television.

(k) "Intranet Transmissions" shall mean transmissions that can only be accessed through an internal computer network accessible only to faculty, staff, students, and other members of the campus community who authenticate themselves through a secure access system.

2. Term of License

The term of this Agreement shall be for five (5) years commencing on the first day of July 2002 and terminating on the last day of June 2007.

3. Grant of License

ASCAP hereby grants to Licensee for the term of this Agreement a non-exclusive license to perform publicly, or cause the public performance, on Licensee's premises, of nondramatic musical compositions now or hereafter during the term hereof in the repertory of ASCAP, and of which ASCAP shall have the right to license such performing rights. Such performances shall include performances presented under the auspices of Licensee, including, but not limited to, performances by faculty, staff, students or alumni of Licensee while performing under the auspices of Licensee and shall include performances by means of Internet Transmissions, including webcasts of college owned and operated radio stations, Intranet Transmissions and Licensee's Cable Television System.

4. Limitations on License

(a) This license is not assignable or transferable by operation of law or otherwise, and is limited to the Licensee and to the premises.

(b) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in ASCAP's repertory to persons outside of the premises, other than by means of (i) music-on-hold telephone systems operated by Licensee at the premises; (ii) Licensee's Internet Site or Service; (iii) Licensee's Intranet transmissions; and (iv) Licensee's Cable Television System.

(c) This license does not authorize performances at any musical attraction that is co-sponsored, co-promoted or co-presented by Licensee and any other entity engaged in the business of promoting or presenting musical attractions.

(d) This license does not authorize any performance by means of a coin-operated phonorecord player (jukebox) otherwise covered by the compulsory license provisions of 17 U.S.C. Paragraph 116.

(e) This license is limited to nondramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action or visual representation;

(iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

The term "dramatico-musical work" as used in this Agreement shall include, but not be limited to, a musical comedy, opera, play with music, revue or ballet.

(f) ASCAP reserves the right at any time to restrict the first American performance of any composition in its repertory and further reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in ASCAP's repertory, or on a claim that ASCAP does not have the right to license the performing rights in such composition.

(g) This license, to the extent it covers Licensee's Internet Site or Service, is limited to performances presented by means of Internet Transmissions, and by no other means; provided, however, that (i) nothing in this Agreement authorizes such performances when transmitted from Licensee's Internet Site or Service pursuant to an agreement between Licensee and any other Internet site or service operator, when accessed by means of a connection from that other Internet site or service, even if such performances fall within the definition of Internet Transmissions; and provided further, that (ii) if Licensee is an Internet access provider, nothing in this Agreement authorizes such performances when transmitted from or through any homepage(s) hosted on Licensee's Internet Site or Service for those for whom Licensee provides Internet access, provided however, that this license shall cover webpages maintained by Licensee's departments, schools, centers and other units, as well as by faculty and staff as part of their official duties and responsibilities to Licensee.

(h) Nothing in this Agreement grants to Licensee, or authorizes Licensee to grant to any User or to anyone else, any right to reproduce, copy or distribute by any means, method or process whatsoever, any of the musical compositions licensed by this Agreement, including but

not limited to, transferring or downloading any such musical compositions to a computer harddrive or otherwise copying the composition onto any other storage medium.

(i) Nothing in this Agreement grants to Licensee, or authorizes Licensee to grant to anyone else, any right to reproduce, copy, distribute or perform publicly by any means, method or process whatsoever, any sound recording embodying any of the musical compositions licensed under this Agreement.

5. License Fees, Reports and Payments

(a) In consideration of the license granted herein, for the following periods, Licensee agrees to pay ASCAP a Base or Minimum License Fee and a Cable License Fee, if applicable, for performances of Locally Originated Programming by means of Licensee's Cable Television System.

(i) The Base License Fee and the Cable License Fee, if applicable, shall each be based on the number of fulltime students during the fall of each year of this Agreement:

Period	Base and Minimum License Fee	Cable License Fee
July 1, 2002- June 30, 2003	Greater of $200 or 25 cents per full-time student	5.25 cents per full-time student
July 1, 2003- June 30, 2004	Greater of $208 or 26 cents per full-time student	5.25 cents per full-time student
July 1, 2004- June 30, 2005	Greater of $224 or 28 cents per full-time student	5.25 cents per full time student.

(ii) The Base, Minimum and Cable License Fee for the contract year commencing July 1, 2005 and each subsequent contract year of this Agreement shall be the Base, Minimum and Cable license fees for the preceding contract year, adjusted in accordance with the CPI Adjustments as defined above.

(iii) Licensee shall report to ASCAP the number of full-time students during the fall of each year by November 1 of each year. Licensee shall also report at that time whether it provides Locally Originated Programming by means of a Cable Television System. License fees shall be payable by January 20 of each year of this Agreement.

(b) All license fees based upon the number of full-time students payable pursuant to Paragraphs 5(a)(ii)(iii) shall be computed to the nearest tenth of a cent.

(c) Licensee agrees to report to ASCAP, on forms supplied free of charge by ASCAP, simultaneously with payment of said license fees, Licensees' total full-time student enrollment.

(d) In the event Licensee shall fail to pay license fees due hereunder by April 30 of the year in which they are due, Licensee agrees to pay a finance charge on the license fees due of 1 1/2% per month, or the maximum rate permitted by the law of the state in which Licensee is located, whichever is less, from the date such license fees became due.

(e) Licensee agrees to furnish to ASCAP quarterly, copies of all programs of musical works performed by Licensee in each of its musical attractions presented during the previous quarter, which are prepared for distribution to the audience or for the use or information of Licensee or any department thereof, and program schedules for Licensee's Cable Television System. Copies of programs of Licensee's musical attractions shall include all encores to the extent possible. Licensee shall be under no obligation to furnish such programs when they have not been otherwise prepared.

6. Reservation of Rights

The parties hereto expressly reserve all rights and privileges accorded by the Copyright Act of 1976, as amended, and other applicable laws.

7. Breach or Default

Upon any breach or default of the terms and conditions of this Agreement, ASCAP may terminate this Agreement by giving Licensee thirty days notice in writing to cure such breach or default, and in the event such breach or default has not been cured within said thirty days, this Agreement shall terminate on the expiration of such thirty-day period without further notice from ASCAP. The right to terminate shall be in addition to any and all other remedies which ASCAP may have. In this event of such termination, ASCAP shall refund to Licensee any unearned license fees paid in advance.

8. Interference in ASCAP's Operations

In the event of:

(a) Any major interference with the operation of ASCAP in the state, territory. dependency, possession or political subdivision in which Licensee is located, by reason of any law of such state, territory, dependency, possession or political subdivision which is applicable to the licensing of performing rights; or

(b) Any substantial increase in the cost to ASCAP of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision which is applicable to the licensing of performing rights,

ASCAP shall have the right to terminate this Agreement forthwith by written notice, and, in the event of such termination, shall refund to Licensee any unearned license fees paid in advance. The written notice provided by ASCAP shall explain the specific reason why it is terminating the license.

9. Indemnity Clause

ASCAP agrees to indemnify, save and hold harmless and to defend Licensee from and against all claims, demands and suits that may be made or brought against it with respect to the non- dramatic performance under this Agreement of any compositions in ASCAP's repertory which are written or copyrighted by members of ASCAP. Licensee agrees to give ASCAP immediate notice of any such claim, demand or suit and agrees immediately to deliver to ASCAP all papers pertaining thereto. ASCAP shall have full charge of the defense of any such claim, demand or suit and Licensee shall cooperate fully with ASCAP in such defense. Licensee, however, shall have the right to engage counsel of its own at its own expense who may participate in the defense of any such action. ASCAP agrees at the request of Licensee to cooperate with and assist Licensee in the defense of any action or proceeding brought against it with respect to the performance of any musical compositions contained in the ASCAP repertory, but not copyrighted or written by members of ASCAP. This Paragraph 9 shall not apply to performances of any works that may be restricted under Paragraph 4(f) of this Agreement.

10. Availability of Other License Agreements

In the event ASCAP offers any other type of license agreement to colleges or universities, Licensee may elect to enter into such other type of license agreement. Such election shall be prospective only, shall be effective at the beginning of the school year, and shall be accomplished by serving written notice on ASCAP of such election at least thirty days prior to the commencement of said school year.

11. Notices

All notices shall be given in writing by United States certified mail sent to either party at the address stated above. Each party agrees to inform the other of any change of address.

12. Modification of Agreement

This Agreement constitutes the entire understanding between the parties with respect to the subject matter hereof. This Agreement cannot be waived or added to or modified orally, and no waiver, addition or modification shall be valid unless in writing and signed by the parties. Licensee recognizes that ASCAP must license all similarly situated users on a nondiscriminatory basis. Licensee agrees that any modifications to this Agreement by ASCAP, which are required by local, state or federal law for other colleges or universities, shall not constitute discrimination between similarly situated users. Examples of such modifications are statements of equal employment opportunity or nondiscrimination on the basis of race, creed, color, sex or national origin.

IN WITNESS WHEREOF, this Agreement has been executed in duplicate original by the duly authorized representatives of ASCAP and Licensee all as of the date first above written.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By: Kyndal Jones
Title: Asst. Svcs Mgr

Rice University
LICENSEE

Mark Scheid

By: Mark S. Scheid

Title: Assistant to the President

Appendix II

Direct Testimony of
William C. Robedee

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C. 20540

In the Matter of **Digital Performance Right in Sound Recordings and Ephemeral Recordings**	)	**Docket No. 2005-1 CRB DTRA**

DIRECT TESTIMONY OF WILL ROBEDEE

(On Behalf of Collegiate Broadcasters, Inc.)

1. My name is Will Robedee. I am currently employed by William Marsh Rice University ("Rice") as the General Manager of KTRU-FM, a position I have held since July of 1998. I also serve as the staff adviser for RTV-5, a campus cable television station. Prior to this position, I was employed by the State University of New York as the Director of the Campus Media Center at the New Paltz campus. All tolled, I have over 21 years of employed and volunteer experience working in and with college radio and television stations which are primarily staffed by students, as a student staff member, a student manager, a hired consultant, and as an employee of educational institutions.

2. I currently serve as the Chair of Collegiate Broadcasters, Inc ("CBI"), a 501(c)(3) corporation. I came into this position after being duly elected by the membership of CBI to the board and subsequently named the chair of the board by a consensus of board members. Prior to that, I was the Vice Chair of CBI, again, having been duly elected by the membership and appointed to the position by the CBI Board of Directors. Prior to being elected to the CBI board in 2001, I volunteered my time in

order to create and maintain its website and to develop various marketing and membership materials. The CBI website was directly developed based on my personal experience of developing and maintaining "College Broadcaster", a web site which I developed to aid college radio stations, independent of any organization.

3. In my capacity as Chair, Vice Chair and volunteer, I actively worked with primarily student staffed college radio and television stations by providing information through almost daily phone consultations, developing and contributing to publications, e-mail list correspondence, website maintenance and content development, convention planning and panel participation.

4. I have authored articles about college radio for College Broadcaster and the Journal of College Radio.

5. I have been a delegate and frequent speaker at the national conventions of the National Association of College Broadcasters ("NACB"), Intercollegiate Broadcasting System ("IBS"), College Media Advisers ("CMA") and CBI.

6. I was a chosen delegate for at the conventions of the National Association of Broadcasters and the National Cable Television Association.

7. I have also authored or co-authored comments and reply comments submitted and reply comments to the United States Copyright Office in the recordkeeping proceedings and format of reports of use[1] directly related to the issues at hand on behalf of CBI, appeared before the Copyright Office to deliver oral testimony, participated in the format of reports Status Conference (July 15, 2002) and provided the Senate Judiciary Committee with written testimony on behalf of CBI[2]. Further, I have co-authored

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[1] These are matters of record and are incorporated by reference.

[2] "Copyright Royalties: Where is the Right Spot On The Dial For Webcasting." May 20, 2002.

comments before the United States Federal Communications Commission on behalf of the members of CBI with respect to "Localism"[3] and "Program Retention"[4].

8. I have been employed by for-profit, commercial stations, and held such titles as traffic manager, production manager, Chief Operator, copywriter, marketing consultant and contract engineer at commercial stations.

9. I have served as the Broadcast Committee chair for College Media Advisers ("CMA"). In this role, I organized the broadcast sessions (over 70) for the 2003 National Student Media convention, of which CBI is a partner. I have also organized the sessions for the 2003 and 2004 Spring National conventions.

10. I am the recipient of the Reid H. Montgomery Distinguished Service Award from CMA, for work without which "many college stations' Internet presence – for many of them their only presence – would have been silenced."

11. At the request of The Chronicle of Higher Education, I answered questions concerning college webcasting in a live Internet discussion in their regular feature "Colloquy Live". The session was entitled, "Webcasting Fees and College Radio" (August, 2002).

12. I hold a Bachelor of Arts (B.A) degree in Broadcast Communication from State University of New York at New Paltz. I first became involved in student radio in 1982, at Cazenovia College's 10-watt station WITC-FM.

13. I base this testimony on information that I learned in my work as an employee, student, contractor and a volunteer in the industry over the past 21 years, and

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[3] FCC MB Docket No. 04-233
[4] FCC MB Docket No. 04-232

upon resources that are available to me that I commonly rely upon in conducting my duties as an employee and a volunteer.

Introduction

14. My testimony will offer two different perspectives on the current controversy concerning the rates and terms for the digital performance of sound recordings by Educational Stations[5]. The first perspective will be that from my first-hand experiences as the General Manager of KTRU. The second perspective will be from the position I hold as the former Vice Chair of CBI as and the current Chair. Both of these perspectives offer pertinent information needed by the Copyright Royalty Board ("CRB") as they consider the rate structure and required terms relating thereto.

Perspective of the KTRU General Manager

KTRU Background

15. KTRU was founded as an experiment by engineering students at Rice in the 1970's. This experiment took shape in the form of an FCC part 15 station. In essence, the station broadcast programming to a single dormitory through the use of existing wiring in the building.

16. Through various spurts of growth, the station obtained a license from the Federal Communications Commissions. Today, KTRU is almost uniquely positioned as a student-operated station with 50,000 watts of effective radiated power ("ERP") in a

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[5] For the purposes of this testimony an educational station is directly operated by, or is affiliated with and officially sanctioned by, and the nonexempt digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a "public broadcasting entity" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396. Further, these services are exempt from taxation under section 501 of the Internal Revenue code, have applied for such exemption, or are operated by a state or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

large market[6]. KTRU's format can be defined as "eclectic." KTRU plays a wide range of music as an alternative to commercial radio.

17. In this vein, KTRU is truly doing its part to maximize the intent of Congress with respect to, "To maximize the availability of creative works to the public",[7] as it pertains to both its broadcast signal and its retransmissions of the same via the Internet, by exposing audiences to new and unknown music.

18. KTRU is licensed to Rice and is primarily staffed by student volunteers. These students do not receive academic credit or financial remuneration for their work. University staff, faculty, alumni and community members also volunteer time at the station. Students comprise more than 80% of the station staff. All management positions are held by students, with the exception noted below. Most volunteers at KTRU do not have aspirations to work in a related field. Rice employs one full-time employee with respect to the operation of KTRU[8], a General Manager, and two half-time employees, an Engineer and an office assistant. The primary responsibilities of these employees are to aid the students in meeting their obligations as an FCC licensee.

19. A faculty adviser provided the only "hands-on oversight" of the radio station prior to the creation of the position I now hold. When I came to be employed by Rice, I was the first person hired to work with the radio station on a full-time basis. At that time,

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[6] KTRU is licensed to serve Houston, TX. According to Arbitron, Houston-Galveston, TX is the 7th largest market in the country. While there are a few Educational stations with a higher ERP or are located in a larger market, this is far from the norm. Educational stations typically operate with a low ERP, if they are licensed at all. For example, radio stations have existed on campuses for years in many forms. Many of these stations do not hold FCC licenses and "broadcast" through various means, including the use of amplifiers and speakers in common areas, low power AM and FM – as permissible by FCC regulations, over cable television stations and more recently via the Internet. Many of these stations use more than one means of transmission.

[7] § 17 USC Sec. 801(b)(1)(a)

[8] As discussed later, most Educational Stations do not have a full-time employee whose primary

KTRU was fully and solely functioning as a broadcast station, with minimal Internet presence. Further, the broadcast station was not easily received on the Rice campus. To solve these problems, I received approval to have the "home page address" changed from a sub-domain name (http://www.rice.edu/~projects/ktru/) to a top level domain name (http://www.ktru.org). I also endeavored to "register" the domain name with various search engines. I also initiated the process to gain the approval of Rice and eventually the FCC to construct a translator[9], which rebroadcasts the transmissions of KTRU in the local area in order to provide a "listenable" signal over the Rice campus.

KTRU's Webcasting Development and Experience

20. KTRU began webcasting in November of 1998. The initial webcasts were conducted using software from Real Networks. In February of 2001, KTRU added a Windows Media Stream. KTRU is currently testing a "Shoutcast" streaming server, with the goal of providing another user-friendly audio format for the Internet.

21. KTRU webcasts primarily consist of the retransmissions of the programming that is broadcast over its FCC licensed facilities. KTRU occasionally webcasts Rice Athletic events as a separate stream.

22. KTRU webcasts are a joint effort of KTRU and the Rice Univsersity department of Information Technology ("IT"). KTRU hosts the encoders, using the free software provided by Real Networks, Microsoft and Shoutcast. These software applications are running on computers that have been handed down from other applications, with the exception of one computer which was paid for by the Rice Athletics department in order to allow the webcast of sporting events that are not

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responsibility is to oversee the station.

[9] FCC Call Sign: K218DA

broadcast on the terrestrial radio station. IT hosts the servers for the KTRU webcasts and uses the Windows Media streaming server that comes bundled with the Windows Media Server software, the Real Server software and the free Shoutcast server. KTRU does not pay IT for hosting the server or for server licenses, nor does KTRU pay for the bandwidth used.

KTRU Streaming Statistics

23. Until December of 2000, KTRU had not discovered a practical means of calculating the number of computers connecting to its Internet streams. I learned that Joel Willer, an Assistant Professor of Mass Communications and Faculty Supervisor of student-operated radio station KXUL at the University of Louisiana at Monroe, had written a program to parse the Real Networks and Windows Media server logs. Mr. Willer provided me with a copy to test for him. In return for testing his program, KTRU was allowed to keep the software. The Willer software, while useful, is not user-friendly and lacks a Graphical User Interface ("GUI"). KTRU also participated in the free ratings services then offered by Measurecast and subsequently by Arbitron[10]. A comparison of the Measurecast and Arbitron data (both were provided at no cost at the time) and Willer's program[11], showed enough consistency for me to regard the differences in data as minor.

24. KTRU's server logs, when parsed with the Willer application, show that KTRU, for the calendar year 2004, had a total of 75,669.55 hours of time when computers were connected to the IT hosted servers. This means that on average 8.6 computers were connected in any given hour Average Aggregate Tuning Hour or

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[10] Arbitron licensed the Measurecast technology in November of 2002.
[11] The data was compared over a one and three month period, respectively.

"AATH". These numbers do not accurately reflect the audience size for sound recordings covered under the statutes, as KTRU's largest Internet audiences come during Rice Athletic Events. Further, the 2004 data does not account for non-musical programming, foreign IP addresses, live, in–studio performances, and certain sound recordings made prior to 1972, and KTRU has no reasonable means to ascertain the AATH or other figures that would account for the material that is not subject to the statutory licenses.

25. KTRU broadcasts Women's Basketball games. The majority of the Rice Baseball games are carried over-the-air with the balance only on the Internet. Occasionally Rice Men's Basketball Games are also broadcast. The highest number of Internet connections to KTRU's servers simultaneously was just over 4,000. This was determined by watching the server software as it reported the number of current connections. This occurred during a Rice Baseball game during the College World Series on June 6, 2005. Even with this immense audience, the AATH for June 2005 was under 30 and the total hours served was under 20,000 for the month.

26. Calculating the fee due from KTRU, using the Librarian's determination[12], KTRU would owe (based on 12[13] estimated performances per hour x 24 x 365x ATH x .0002) $180.81 in section 114(f) royalties plus $15.91 in 112(e) royalties ($180.81 x .088) for a total of $196.72. It is important to remember that this figure does not account for material not covered by the statutory license.

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[12] See "Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule", 67 Fed. Reg. at 45260 (July 8, 2002)

[13] See "REPORT OF THE COPYRIGHT ARBITRATION ROYALTY PANEL, February 20, 2002" at 110.

A Comparison of Audiences

27. The Fall 2004 Arbitron Data for KTRU shows an AQH of 300 for Monday thru Sunday on a 24-hour basis. Unlike server logs, Arbitron does not count listening by those under the age of 12, nor did Arbitron count radios tuned to a station with no one listening to the radio. Further, Arbitron uses sampling to measure audiences, whereas the parsing of the server logs tracks the number of computers connected to a server. Arbitron defines AQH as, "The average number of persons listening to a particular station for at least five minutes during a 15-minute period."[14]

28. The Internet service provided by KTRU is truly, at best, a secondary service of the student organization. The relative audience sizes make this point clear. Even if KTRU rounded up its Internet audience from 8.6 average connections to 9, the Internet audience is still only 3 percent of its broadcast audience. Again, for this to be relevant to the proper calculation of use of sound recordings, KTRU would have to have programmed only sound recordings covered by the statutory license 24 hours a day. In providing this service, KTRU expends little in terms of resources, using low-end computers and free encoding software, it does not pay for bandwidth or servers.

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[14] http://www.arbitron.com/onlineradio/glossary.htm

Licensing Cost Comparison

29. If we apply the Librarian rate to the over-the-air broadcast audience, KTRU would owe $6,307.20. Conversely, if we apply the derived per performance fee from the over-the-air broadcast, based on the combined PRO fees, the Internet audience royalty owed by KTRU would be $17.54 for the Section 114 royalty. This values the sound recording at more than SEVENTY-SIX times the musical work when compared to the calculated per performance rate for the sound recording with the 2004 SESAC rates, which would likely the best single PRO indicator of an appropriate fee, if it weren't for the non-precedential language in the voluntary agreement that set the fee. For the sake of argument, when this metric is applied using the 2004 rates for the combined PROs, the sound recording is valued at over ELEVEN AND A HALF times the musical work. Even though the rates are for different rights and the PRO[15] rate is non-precedential, the disparity cannot be explained rationally, particularly given the long history of the PRO rates and the lack of history associated with the sound recording rate.

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[15] Generally, ASCAP, BMI and SESAC are collectively known as Performing Rights Organizations ("PROs").

The Per Song, Per "Listener" and Recordkeeping/Format of Reports of Use Problem

30. KTRU, through the services of a community volunteer, developed a system to replace the traditional practice of recording data pertaining to music use on paper logs with a computerized system. This was done to better track what the DJs were playing and to assist in generating reports for CMJ, a commercial music tracking organization which sells this data to record labels. The labels then provide free copies of music to Educational Stations based on the purchased data. A student volunteer worked with the community volunteer to develop code that would enable KTRU to display the information required.[16]

31. KTRU does not record music to computers for play-back on-the-air, nor does KTRU use software to generate a list of songs intended for airplay. KTRU, like many Educational Stations allows the DJ to select the music they play. The DJ plays music from the native media, in most cases, CD's, but also from the vinyl records, which date back to the 1970s and in some cases, earlier. KTRU also brings in local and touring artists for interviews and live, in-studio performances, which are not subject to the statutory licenses. This means there is no meta data to be transmitted to the computer used to track music ("Playlist Computer"), thus requiring each DJ to manually enter the song data into the Playlist Computer.

32. It is important to note that song data fields are populated manually by the DJs as they perform their other responsibilities while on the air. Further, the computer won't time stamp the entered data until the volunteer DJ completes the entry. This means that the time reported rarely, if ever, exactly matches the time the song begins to play and very often, there is a significant delay between the time the song begins to play and when

the data entry is completed. Couple this with the fact that the Playlist Computer and the streaming server clocks are not synchronized and would drift even if they were. Tying audience size to sound recording data would yield results that are meaningless. Even if the computer clocks were perfectly synchronized, the delay inherent in many streaming applications, including those employed by KTRU, ensures a lag time between when the song is broadcast and when it reaches the Internet computers, which themselves receive the songs at different times.

33. The system also does not offer any means to time stamp the end of a song. The only possible way to try to judge the length of a song would be to calculate the time between entries. This would deliver false data as the DJs often speak between songs and program other material that is not subject to § 114 and § 112 royalties. For the above reasons, it is clear that KTRU can not generate per song, per listener data that would be meaningful.

34. KTRU would experience an undue burden if it were compelled to comply with the format of the "Reports of Use" as proposed by SoundExchange. The proposed requirements are unreasonable for an operation such as KTRU.

35. If KTRU did not opt to participate in the settlement negotiated under the SWSA[17] for noncommercial stations, KTRU would have paid double what it owes under the Librarian's Determination, due to the $500 minimum fee. The interim regulations[18] adopted by the Copyright Office still pose problems for KTRU with respect its ability to

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[16] 17 U.S.C. § 114 (d)(2)(C)(ix)

[17] pl107-321 is commonly referred to as the SWSA.

[18] "1. Name of Service 2. Transmission Category 3. Featured Artist 4. Sound Recording Title 5. Sound Recording Identification Album Title Marketing Label OR International Standard Recording Code (ISRC) 6. Total Performances Aggregate Tuning Hours Channel or Program Name Play Frequency OR Actual Total Performances" 69 Fed. Reg. 11523 (March 11, 2004)

comply due to the need to manipulate data, post entry and the proposed format for the reports of use[19]. Fortunately, the SWSA settlement provided KTRU with another option.

Conclusion of the KTRU General Manager

36. It is imperative that regulations be adopted that will allow Educational Stations, such as KTRU, to continue to operate their Internet services so that they can continue to "maximize the availability of creative works to the public" via webcasting. If the Librarian's Determination were the only available option, coupled with the Copyright Office's interim recordkeeping regulations, and Sound Exchange's proposed format for Reports of Use, it is doubtful if KTRU or very many other Educational Stations would be able to continue to operate due to the fact the rates and terms are not reasonable for their type of service.

Perspective of the CBI Chair

Who is CBI?

37. CBI's mission is to "represents students involved in radio, television, webcasting and other related media ventures; ensures a commitment to education and the student pursuit of excellence through active involvement in electronic media; promotes cooperative efforts between the Association and other national, regional, and state media organizations; facilitates the discussion of issues related to student-operated electronic media; and other community oriented programs."[20] CBI's membership consists of university and college radio or television stations. Educational Stations that do not meet this definition and pay dues are considered "Associate Members". CBI membership is diverse and nationwide.

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[19] See the comments of CBI in the relevant proceeding, which are incorporated herein, by reference.

[20] Collegiate Broadcasters, Inc. By-Laws (See http://www.collegebroadcasters.org/bylaws.shtml)

38. The board of CBI has asked me to comment on various aspects of this proceeding, including the proper and historical methods of determining a rate structure for the royalties to be paid for the use of sound recordings and ephemeral recordings, and the terms applicable thereto, including recordkeeping, keeping in mind that recordkeeping responsibilities is an interrelated and crucial component of the fee stations are willing to pay, which must be accounted for in the willing buyer statutory requirement.

Educational Stations are a Distinct Sub-Group

39. Educational Stations have long been established as distinct sub-group of broadcasters. Various organizations have come and gone through the years to support and work with this sub-group (CBI, IBS, NACB, and CMJ as examples). With respect to copyrights, 37 CFR 253.5 clearly creates a distinction between these stations and other non-commercial stations. The previous CARP also asked for information concerning non-CPB affiliated, noncommercial radio stations, stating that "the record tells little about those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those who that are not."[21]

The Nature of the Educational Station

40. A qualifying definition of an Educational Station has already been provided in this testimony. It would be helpful for the Copyright Royalty Board ("CRB") to understand more about the nature of Educational Stations.

41. Perhaps the most defining quality of Educational Stations is that no two are alike. CBI observes many similarities in some operational areas at some stations to the level where it could subdivide the sub-category of Educational Stations into specific

groups. Rather than expend a great effort to detail these tangential areas, I offer the following observations concerning the most common traits and types of stations.

42. Most Educational Stations are funded through student activity fees or the meager budgets afforded to academic departments. In the recordkeeping proceeding, Intercollegiate Broadcasting System ("IBS") has offered that the average station in their membership has a budget of $9,000[22].

43. Educational Stations are, for the most part, operated by student volunteers. Some stations offer credit for some management positions and some others pay some of their staff. Many more offer no remuneration in the form of credits or pay for the activities of the students, as many stations are considered clubs, simply lacking the resources or formal ties with academic departments.

44. Educational Stations, as explained *supra*, transmit their audio through various means. There are hundreds of Educational stations that are operating with an FCC license. Most of those are operating with less than 1000 watts of ERP and some with 10 watts or less. There are also hundreds of stations that operate without a license, either by permissibly using very low power systems that don't require a license, or by transmitting in a closed circuit fashion, such as a campus cable television plant. Others came into existence solely due to the advent of webcasting. Most of the unlicensed stations remain unlicensed due to various obstacles. These can include, spectrum scarcity, which prevents them from obtaining a license, capital cost issues, and inadequate knowledge of the process to obtain a license. Further, under-developed organizational structure, churn of volunteer staff, institutional issue and the inability to endure the long process of

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[21] CARP Report at 93
[22] Docket No. RM 2002-1H (May 27, 2005)

obtaining the license in a competitive environment, are all factors that work against stations in trying to obtain a federal broadcast license.

45. For most unlicensed stations, the advent of the Internet supplanted their previous program distribution model(s) or now renders them secondary. The unlicensed stations rely heavily, or even solely, on the Internet to reach an audience of any size. These stations are most often those with the least resources.

46. Licensed Educational Stations are, with few exceptions, prohibited from airing advertisements. They are allowed to solicit underwriting. Some stations enjoy success with their underwriting endeavors, but most do not due to their small signals and small, sometimes un-measurable audiences. Small signals and audiences also plague the efforts of the unlicensed stations efforts to obtain ongoing advertising or underwriting of any consequence.

47. While many stations are integrating new technology into their operations, most lack the sophisticated automation systems that are common at commercial stations and which are the norm for commercial webcasters. The limited budgets and limited means of adding to the operating budgets, along with an inability to carry funds forward from one year to the next, prohibits many stations from making non-essential capital acquisitions, such as automation systems.

The Previous Determination Concerning Rates and Terms for Noncommercial Stations will not Work for Educational Stations.

48. The purpose of this proceeding is to determine reasonable rates and terms for the digital performance of sound recordings and ephemeral recordings. Due to the nature of CBI's membership, this testimony will address the rates and terms that would be applicable to Educational Stations.

49. The basis for determining reasonable rates must be consistent with the statute and the intent of Congress, which requires a hypothetical marketplace to establish the rates a willing buyer and a willing seller would come to agree upon.[23] The determination of rates can not be done in a vacuum, as the terms of the statutory license, particularly at Educational Stations, can add significantly to the cost of the license, and even deter the educational entity and frustrate the objective to "maximize the availability of creative works to the public"[24].

50. The previous rate determination by the Librarian failed to provide a workable model for the vast majority of Educational Stations due to:

- the lack of representation of these stations at the prior rate determination proceeding which provided the CARP and the Librarian had no record base rates for this distinct sub-group,

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[23] As noted in the next section, Educational Stations were not represented in the previous rate determination and there have been no arms length settlements with Educational Stations. Further, CBI forwarded a proposal to SoundExchange and the RIAA. SoundExchange never responded to the proposal in any form. The RIAA never offered a substantive response. Thus, the need for the hypothetical marketplace still exists.

[24] 17 USC 801(b)(1)(a)

- the use of a single webcasting agreement with a *commercial* service as the basis for setting a *single* noncommercial rate. That rate was based solely on an offer made by the RIAA, which did not take into account the different types of eligible noncommercial nonsubscription transmission services, and
- the fact that neither the CARP nor the Librarian were presented with evidence to consider the cost of the required recordkeeping, particularly as would be envisioned in by the RIAA in a later proceeding[25], and the effect that unreasonable burden would have on the rate determination between a willing buyer and willing seller, particularly with respect to Educational Stations.

51. Even if these compelling reasons to examine the prior rate decision and structure did not exist, there is no reason the CRB should not examine the rates, rate structure and associated terms for Educational Stations in light of the record being established in this instant proceeding, particularly when recordkeeping is now clearly within the purview of the CRB.

An Examination of the Rate Structures

52. As established, this proceeding must determine *reasonable* rates and terms for the statutory license that distinguishes between the different types of services.

53. The question then arises, how should these rates be determined? There are historical models which can be examined to aid the CRB in a determination of appropriate rates for the Educational Stations. Below I have identified and then examine five rate models[26]. These include;

- Percentage of Revenue

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[25] See 67 Fed. Reg 5765-6 (February 7, 2002). Also note the recordkeeping requirements under §253.5, which were developed under virtually identical language in the statute.

- Flat Fee
- Per Song, Per Listener
- Campus Enrollment
- Unknown/Federally Subsidized

Percentage of Revenue

54. Until only a few years ago, the rate structure for musical works for commercial radio stations used a percentage of revenue model. Broadcasters sought to escape the percentage of revenue model and now use the prior fees as a benchmark and then add their portion of the industry total fee based on individual station audience size. (Note that there is no separate or apparent increased fee for the use of musical works on the Internet, which parallels the addition of Internet rights as discussed in the Enrollment Model evaluation.) [27]

55. Subscription services under § 262.3(a)(2) may elect a percentage of subscription service revenues option, with a minimum fee of $500[28].

56. Business Establishment services pay 10% of gross proceeds under § 262.3(a)(3), with a minimum fee of $10,000.[29]

57. As mentioned above, commercial stations previously paid for the use of musical works based on revenue, but have moved away from this model. NPR Stations

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[26] This list and the examples derived there from are intended to be representative, not all-inclusive.

[27] Details of the ASCAP and BMI agreements are available at http://www.radiomlc.com/ascap.html and http://www.radiomlc.com/bmi.html, respectively. "establishes new ASCAP performance licenses for the period 2004-2009 that, for the first time, unlink the fees payable to ASCAP from station revenues" "and provides stations with the right to perform ASCAP music as part of a simultaneous stream of their over-the-air signals on their Internet web sites". "establishes new BMI performance licenses for the period 2001-2006 that, for the first time, unlink the fees payable to BMI from station revenues" "and provides stations with the right to perform BMI music as part of a simultaneous stream of their over-the-air signals on their Internet web sites." As viewed on October 19, 2005.

[28] 37CFR 262.3(d)(2)

[29] 37CFR 262.3(d)(1)

have had their rates adjusted by a CARP using revenue as *a* determining factor[30]. For both of these groups of services, revenue data is readily accessible, as generating reports of revenues and expenses in terms that comply with Generally Acceptable Accounting Principles ("GAAP"), is standard operating procedure for these entities.

58. The same cannot be said for Educational Stations. The Percentage of Revenue model is not a proper or even feasible means of determining rates for Educational Stations, as there is no means of accurately gathering this data from Educational Stations that would conform to GAAP.

59. The Educational Stations that are FCC licensed are prohibited from airing commercials (with minor exceptions) and their ability to solicit underwriting is hampered by their small audience size, limited resources of a volunteer staff and, in some cases, campus policies that prohibit soliciting funds by student groups. With limited budgets, volunteer staffs, federal prohibitions and campus restrictions on advertising and underwriting, these stations typically have the smallest budgets of any of the services represented in these proceedings.

60. Finally, Educational Stations bear no resemblance to the commercial entities that pay royalties based on this metric.

61. For these reasons, the Percentage of Revenue metric will not be used in my analysis of methods that are appropriate to determine the rates and terms that should be applied to Educational Stations.

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[30] See the CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 1998

Flat Fee

62. Non-commercial stations have historically paid the PROs a flat fee for the use of musical works. The flat fee has been broken down into two categories.

- Educational Stations. Noncommercial radio "stations which are licensed to college, universities or other nonprofit educational institutions and which are not affiliated with National Public Radio."[31]
- Non-NPR/Non Educational Stations ("Other Stations"). "[R]adio stations not licensed to colleges, universities or other nonprofit educational institutions and which are not affiliated with National Public Radio."[32]

63. The fees paid by Educational Stations and Other Stations clearly demonstrate that Other Stations and Educational Stations have been treated differently with respect the fees they pay to the PROs. Educational stations have, between 1997 and 2005, paid between 56 and 61 percent of the Other Stations.[33]

64. The Flat Fee structure was also used in a private agreement between Yahoo! and the RIAA for ephemeral recordings.[34]

65. This rate structure is simple, easy to manage and places no burden on the station in the form of calculating a fee. The PROs have collected royalties using a flat fee from Educational Stations and Other Stations over an extended period of time. Royalties

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[31] 37CFR 253.5 (a)

[32] 37 CFR 253.6 (a)

[33] This is simply meant to establish the history of recognizing Educational Stations as a distinct sub-group. I will not attempt to calculate an appropriate fee for Other Stations, nor is this information meant to suggest an appropriate rate model for other stations.

[34] CARP report at 100, "Flat fee. This second type of ephemeral rate agreement (with Yahoo!) resulted in the largest ephemeral royalty amount paid under any of the 26 agreements and was related to the largest number of performances. The Yahoo! agreement is calculated on the basis of a flat fee, with a payment of xxxxxxxx for the initial time period (through 12-31-00) and an additional xxxxxxx for each 12-month renewal."

are distributed to the Copyright Owners without placing an undue recordkeeping burden on Educational Stations.[35] The Flat Fee appears to meet the test of reasonableness and it is not precluded by statute; therefore, it will be included in the fee determination analysis portion of this testimony.

Unknown and Federally Funded

66. This applies to "NPR and other public broadcasting entities engaged in activities set forth in 17 U.S.C. 118(d)… except for public broadcasting entities covered by §§253.5 and 253.6. "[36]

67. The Corporation for Public Broadcasting ("CPB"), NPR and Public Broadcasting Service ("PBS") negotiated a private, confidential agreement with the PROs; thus, the terms of that agreement are not available. It is known, however, that the NPR and PBS station fees are paid for by the CPB; hence, the stations do not incur a direct fiscal cost for the license itself.[37] CPB and NPR also negotiated a private agreement for the sound recording rights covered under the statute pertinent to this proceeding for the period.

68. Since the Educational Stations receive little or no federal funding and the fees currently paid by CPB on behalf of NPR (and PBS) stations for sound recording royalties are unknown, this model cannot be used to perform an analysis.

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[35] 37CFR253.5(e) reads, "Records of use. A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports."

[36] 37CFR253.4

[37] "CPB will pay the license fees for the BMI, SESAC, ASCAP and RIAA license agreements." As viewed

Per Song, Per Listener/Aggregate Tuning Hour ("ATH")

69. The current rate structure is based on this metric, but most Educational Stations, to the best of my knowledge, do not pay using this rate structure, as they have opted to use the rates and terms offered by the agreement negotiated pursuant to the SWSA. The per-song, per-listener fee offered by the CARP and adopted by the Librarian is extremely problematic for Educational Stations in that it requires two sets of data acquisition and management that include accurate audience measurement and detailed recordkeeping and reporting which are beyond the capabilities of most Educational Stations. For most other Educational Stations the requirements are above and beyond what most would consider reasonable, due to their limited budgets, the character of the operations, the volunteer nature of their staff and their often limited technical resources.

70. In almost all instances, Educational Stations use some combination of two or more computers to stream audio over the Internet. The first is used to change the audio into packets of data. This computer is commonly referred to as the encoder. The encoding software is generally user-friendly, utilizing a Graphical User Interface ("GUI"). The second computer is generally a more sophisticated device, known as a server, which requires a much higher level of sophistication by the user. The server receives the data (the processed audio) from the encoder and then makes this stream of data packets available to other computers via the Internet.

71. Based on my interactions with Educational Stations that webcast, I have found four distinct implementations of the technology at Educational Stations.

- "Self-Contained". The station hosts the encoding computer and the Internet server.

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on October 25, 2005 at http://stations.cpb.org/musicrights/.

- "Institutionally Assisted". The station hosts the encoding computer and another department hosts the server.
- "Externally Served". The station hosts the encoder and a third party (normally a commercial service, such as an ISP or Live365), hosts the streaming server.
- "Combination". The Station uses one or more of the above.

A fifth "implementation" was not unheard of in the late 1990's and early 2000's, in which a third party received the station over-the-air and streamed its signal, with or without the knowledge of the station, but this uncommon practice seems to have virtually vanished.

72. In the Self-Contained model, the station has the ability to access the server and server logs, yet, most stations lack the ability to parse these logs to determine ATH. To my knowledge, "off-the-shelf" software to perform such an analysis is not currently available.

73. The Institutionally Assisted stations, in most instances are unable to access the logs, which are the property of another department that, understandably, restricts access to its servers. At many other campuses the Institutionally Assisted stations only receive generic reports from the server administrators which do not provide the type of information needed to determine ATH, much less that would be required to compute per-song, per-listener song data. Often, the statistics provided to the Educational Stations includes the data for the entire campus, including other streaming services, and the station has no way of determining what percentage of the volume belongs to the station.

74. Externally Served stations often find themselves in the same situation as the Institutionally Assisted stations. The Externally Served stations, almost without

exception, are paying for the bandwidth used. Thus, they shop for the least expensive options available, which naturally results in the least amount of service from the vendor, including a lack of statistics sufficient to accurately determine audience.

75. There is no need to describe the problems that the Combination Stations encounter, as they are likely additive to the problems already described above.

76. In addition to the problems detailed above based on the information I have gathered from stations, the best guess at audience size at the typical Educational station is so small that applying the current rate structure means that almost every Educational Station falls far, far, below the minimum fee. This does not suggest that the rate is too low, rather, it suggests that the minimum fee is too high, because in order for these stations to exceed the minimum fee, they would need to pay a rate in excess of the commercial rate.

77. It is important to note here that almost all Educational Stations pay the minimum fee under the SWSA and can demonstrate compliance. They base their current payments on a limited variety of methods to determine that they do not exceed the qualifications necessary to pay only the minimum fee[38]. These include, but are not limited to:

- software that limits their audience either based on size either by purchased capacity, self-selected caps available via the software or limitations in free versions of the software,
- by the use of server graphical interfaces that provide live snapshots of the number of connected computers, and

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[38] This reference is not intended to raise specific factual information concerning the terms of the settlement, rather to demonstrate that stations are able to determine compliance without the need for detailed reports

- bandwidth limitations.

78. The CARP, as it noted in its report, lacked evidence to set a rate for "non-CPB affiliated, non-commercial radio stations."[39] Given no evidence, the CARP opted "rather than subject the non-CPB broadcasters to the commercial rate, the Panel hereby accepts RIAA's invitation to set a rate for non-CPB broadcasters at a rate which is one-third of the commercial broadcaster rate of 0.07¢ perperformance. Rounded to the nearest hundredth of a cent, the derived rate equals 0.02¢ per-performance."[40] Further, the CARP was not given any reason to set rates for the distinct sub-groups within the non-CPB funded, noncommercial broadcaster group of services. Even more telling, is that the rate offered by the RIAA was based on a rate setting proceeding for a *different right*[41] and that its formula was based on a percentage[42] of fees paid by an entirely different class of public broadcasters. It is also worthy to note that the corresponding footnote to this section states, "We assume that in a willing buyer/willing seller negotiation, the negotiated rate would be no higher than the rate 'offered' herein by RIAA." [43]

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from servers.

[39] "Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations ("non- CPB broadcasters") presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. *See* Tr. 9009-13. The record tells little about those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those that are not." (CARP Report at 93)

[40] CARP Report at 89-90

[41] The CARP and the LOC declined to set rates based upon the PRO rates, at least partially, based on the fact that it was a different right. Further, the LOC stated that the webcasting PRO minimum fee exceeded the minimum fee set forth in that proceeding. While this is historically true, that is no longer the case for Educational Stations. In fact, it would be difficult, at best, to establish any fee being paid by Educational Stations for the use of musical works on the Internet that are above and beyond the fees charged for non-Internet use. See the evaluation of the Enrollment model of this testimony for additional information.

[42] The determination of the Librarian of Congress noted at 45258 that, "Next, the Panel examined RIAA's approach, which focused on the amount awarded in the 1998 Noncommercial Education Broadcasting Rate Adjustment Proceeding for use of their works by noncommercial stations. It adduced that they received 1/3 the amount of the fees paid by the commercial stations." The 1998 proceeding referenced determined the rates for only CPB funded stations, not the universe of noncommercial stations.

[43] CARP Report at 89-90

4. Bandwidth limitations.

78. The CARP, as it noted in its report, lacked evidence to set a rate for "non-CPB affiliated, non-commercial radio stations."[68] Given no evidence, the CARP stated "rather than subject the same 2/3 broadcasters to the commercial rate, the Panel, instead accepts IBAA's invitation to set a rate for non-CPB broadcasters at a rate which is one-third of the commercial broadcaster rate of 0.07¢ per-performance. Provided to the various bandwidth of a rate, the discounted rate equals 0.02¢ per-performance."[69] Further, the CARP was not given any reason to set rates for the distinct sub-groups within the non-CPB funded, noncommercial broadcaster group of services. Even more telling, is that the rate offered by the IBAA was based on a rate setting proceeding for a different right[70] and that its formula was based on a percentage[71] of fees paid by an entirely different class of public broadcasters. It is also worthy to note that the corresponding footnote to this section states, "We assume that in a willing buyer/willing seller negotiation, the negotiated rate would be no higher than the rate 'offered' herein by IBAA."[72]

Given rates.

[68] [illegible] non-CPB affiliated, non-commercial radio stations ("non-CPB broadcasters") [illegible] [illegible] the record contains virtually [illegible] about these non-CPB broadcasters that are represented by the IBAA [illegible] that we not." (CARP Report at 93)

[69] CARP Report at 88-91.

[70] The CARP and the LOC declined to set rates based upon the [illegible] [illegible]

[71] The determination of the Librarian of Congress [illegible] [illegible]

[72] CARP Report at 88-89.

79. The reliance upon an offer by the RIAA as the basis for setting rates is, in that setting, by legal precedent, not arbitrary, as the CARP had to set rates based on the record; but it does confront common sense and, as the CARP noted, it prescribed a rate which was the ceiling for a rate that would have come from a willing buyer/willing seller negotiation. Further, the CARP was not presented any reason to offer Educational Stations reduced rates, which would be consistent with their status as a disinct sub-group in other arenas, regardless of the right being addressed or the non-precedential language used in those documents. Further, the rate offered by the RIAA is based on a rate setting proceeding for musical works. While the Panel and the Librarian were reluctant to use rates from a proceeding involving a different right, in adopting the RIAA rate it did exactly that. To compound the difficulty that Educational Stations have with the acceptance of the "ceiling" rate, the rate was derived from a CARP where the rates were being negotiated for PBS and NPR, not Educational Stations. As discussed *supra*, revenues are not a useful indicator in this rate setting proceeding.

80. The KTRU analysis is consistent with the conclusion that the current rate structure and minimum fee are excessive for Educational Stations. Regardless, an analysis will be performed to place a proper value on this metric, based on the determination of the previous CARP, even in light of the fact that the data required for Educational Stations to apply this metric is not available to them.

Campus Enrollment

81. The PROs have negotiated private license agreements with Educational Institutions. These licenses allow the performance of musical works by or at sporting events, student unions, classrooms, fraternities / sororities, socials, college theater groups, fairs, festivals, college orchestras, Musical Attractions, fitness centers, athletic facilities, student bands, special events such as orientation and graduation and Internet Transmissions, among other uses. The Internet Transmissions right was added in 2002 by ASCAP and BMI.

82. The increase in costs to colleges and universities for the addition of the Internet transmission right to the campus blanket agreement is not specifically addressed in the agreements; but if the normal adjustment for inflation is factored in, the portion attributable to Internet Transmissions is nominal. This is, perhaps, the only arms-length transaction that even closely represents a parallel digital right royalty for musical works with respect to educational institutions. Again, there is no easy means to precisely calculate the value this right added to the contract, but it would appear to be nominal.

83. While the Enrollment Model is an appropriate means for calculating fees for the use of musical works on a campus, it is not an appropriate metric for basing a fee structure exclusively for Internet Transmissions of sound recordings, as it is a part of a bundle of permitted uses – primarily meant for on-campus use.

84. Another comparision demonstrates that this model is not appropriate. Many large educational institutions have very small Educational Stations and conversely, many small schools have larger, more well established Educational Stations. For example, Rice

is well established and respected University, with a Federally Licensed radio station operating at 50,000 watts of effective radiating power; yet the student population, was only 4,855 in 2004. [44] Conversely, KUGR is an unlicensed student operated station at Washington State University in Pullman, WA, which has an enrollment of 23,121[45] and every indication available shows that KUGR has an Internet audience that is a small from of that of KTRU.

85. Due to these considerations, this rate model will not be considered in the final analysis.

The Rate Analysis.

86. Using a reasonableness test and/or a test of applicability to Educational Stations from the various rate structures, only the Flat Fee model emerges as a proper metric for Educational Stations. To determine a basis for a proper flat fee, I will use the per song, per listener model and the current rate and arrive at an Educational Station rate based on the differential in rates for CPB funded stations and Educational Stations in the areana of musical works.

87. The present commercial rate is $.0007 per song, per listener for commercial services. The prior CARP established $.0002 as the noncommercial non-CPB rate. As discussed, *supra*, this rate was the result of the RIAA offering a rate that is no less than one-third of the commercial rate, based on a ratio from a prior rate setting proceeding involving rate adjustment for musical works for CPB-funded stations. The Educational Stations are not CPB funded, are a distinct sub-group and do not resemble CPB stations with respect to the amount of revenue they generate. These factors and the historical

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[44] See http://www.ruf.rice.edu/~instresr/ricestatistics/Pages/enroll04.html

[45] See http://en.wikipedia.org/wiki/Washington_State

differences in rates paid for rights by different types of noncommercial stations justifiably leads to the conclusion that a ratio established from the rate adjustment proceeding involving only CPB-funded stations is not the same rate that Educational Stations should pay.

88. The most recent benchmark for CPB which was established by a CARP came in 1998.[46] In that determination, the CARP awarded ASCAP $3,320,000 and BMI $2,123,000 for a total of $5,443,000. These figures include both radio stations and television stations. The CARP did not delineate how much of each amount was attributable to television or radio stations. BMI and ASCAP did offer separate numbers for Radio and TV in their respective testimonies. BMI wanted $6,895,000, with $5,500,000 from TV and $1,395,000 from radio. ASCAP wanted a total of $7,982,000, with $4,612,000 from TV and $3,370,000 from radio. This puts the BMI and ASCAPs radio portion at 20% and 42%, respectively. Applying the percentages expressed by each PRO to the adjusted amount, the CPB radio total fees for 1998 would be $1,831,230.30.

89. The radio portion of the fee represents the total that would be paid on behalf of CPB stations. It is then reasonable to divide this figure by the number of stations to determine a representative per-station fee. Using 790 as the number of stations, the per station fee is $2,318.01.[47] The 1998 fees for the comparable rights totaled $444[48] per-station for Educational Stations, which is 19% of the representative, per radio station CPB fee. Thus, the Educational Station fee should, at a maximum, be 19% of the fee

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[46] See generally 63 Fed. Reg. 49823 – 49837 and "Report of the Panel" in Docket No. 96-6 CARP-NCBRA

[47] The 790 station count was derived from http://www.cpb.org/aboutcpb/financials/appropriation/justification_06-08.pdf at 2. This 2005 report likely overstates the number of stations funded by CPB in 1998 and therefore, the derived, per station representative fee is likely understated.

[48] The $444 is overstated as it includes the overhead of two rights organizations.

offered by the RIAA because that fee was derived from a proceeding that only involved CPB-funded stations. This would result in a maximum appropriate fee for Educational Stations of $0.000042 per performance.

90. If this fee is applied to the KTRU numbers, KTRU's liability (minus the minimum fee requirement) for 2004 would be $37.97 in section 114 royalties and $3.34 in section 112 royalties for a total liability of $41.31[49].

91. When considering rates, there should be no upward adjustment granted to the sound recording rate on the basis of displaced sales. Conversely, the study, "*Arbitron/Edison Media Research Internet 9. The Media and Entertainment World of Online Consumers*" shows that "Habitual consumers of webcasting buy the most recorded CDs."[50] and, "Half of weekly audio Streamies say that they have purchased a CD because they heard the artist's music over the Internet."[51] If anything, a downward adjustment to the rates would be appropriate.[52]

92. It appears clear that, even under the current rate structure, that the vast majority of Educational Stations will not exceed the minimum fee, which then ceases to be a minimum fee, rather, a confiscatory fee. It is also clear from the recordkeeping proceeding that the vast majority of Educational Stations are unable to generate, calculate and prepare the data needed to fully support the per song, per user/ATH metrics. A flat fee appears to the only appropriate means of charging stations for the use of sound and ephemeral recordings.

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[49] This figure is again overstated due to the fact that the ATH used does not account for programming not covered under the statutes pertinent to this proceeding.

[50] Arbitron/Edison at 3 – http://66.219.105.7/home/archives/I9_FinalSummary.pdf as viewed on October

[51] Id at 17

[52] "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings" U.S.C. 114(f)(2)(B)(i)

The Flat Fee

93. The previous rate determination established a minimum fee for all webcasters (other than Business Establishment Services) of $500. This was based on a commercial agreement the RIAA had previously negotiated. The rationale used was that the RIAA, being a savvy entity, would not negotiate a minimum fee that would cause it to loose money in a transaction, and that there is an intrinsic value for access to the copyrighted material.

94. The $500 minimum fee is inappropriately high for Educational Stations, particularly in light of the limited number of performances by Educational Stations. Further, Educational Stations are likely to have a lower transactional costs due to the lack of a need to extensively examine and/or audit the statements of accounts from Educational Stations, the intrinsic value of the sound recordings most commonly used by Educational Stations is lower than their commercial counterparts,[53] and the fact that stations are likely to fewer less sound recordings than other services, which would translate into less processing of reports of use.

95. With these factors supporting the case that the minimum fee is excessive, the current minimum fee should not be used as the Flat Fee for Educational Stations.[54]

96. The 2004 year AATH for KTRU is, based on my experiences, larger than most Educational Stations. KTRU is in a large market, is an established station, both on the Internet and over-the-air, which broadcasts 24/7/365 (with the exception of occasional down time due to equipment failure or maintenance) and, in addition to its musical

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[53] No one can reasonably argue that the intrinsic value of popular music, such as sound recordings by Madonna, Britney Spears and Reba McIntire has the same intrinsic value as sound recordings by The Wrens, Dr. Israel and Wilderness when it comes to the marketplace.

[54] It is important to note again, that CBI is proposing this rate structure and associated fee solely for

programming, carries popular division 1A NCAA athletic events. Many Educational Stations, particularly those that do not posses a broadcast license, do not operate year-around. Many do not operate 24 hours a day during the times of the year that they *are* functioning. Certainly, there are examples of stations that have better numbers than KTRU in terms of ATH, but those are the exceptions to the norm.

97. As discussed, *supra,* not only is the KTRU Internet audience larger than most Educational Stations, its ATH is also overstated when it comes to serving as a basis for paying the statutory royalty.

98. Thus, it would be logical to set a Flat Fee for the use of the sound recordings around the KTRU figure when the rate has been adjusted to 0.000042. This would set the Flat Fee well above the average actual fee for all Educational Stations using the overstated ATH of KTRU with an overstated, adjusted ceiling rate for Educational Stations. To account for other items, such as intrinsic value and transactional costs, it would be overstating such values to add in the current minimum fee charged by any of the PROs, with respect to musical works in the arena of Educational Stations, due to the fact that this license not only covers intrinsic value, but also transactional costs and royalties paid to copyright owners as well.[55] The 2005 SESAC rate added to the KTRU fee is $85.00 + $41.31 = $126.31. This represents the maximum figure for a Flat Rate fee to be paid by Educational Stations, due to the overstatement each step of the way, in favor of the copyright owners and performers. Restated, these figures far exceed the average Educational fee due, absent a minimum fee requirement. The fact that some

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Educational Stations.

[55] Additionally, the prior CARP stated, with respect to the minimum fee that, "This belief is premised upon one fundamental assumption -- that a sophisticated and experienced negotiator, such as RIAA, would not negotiate a minimum fee that would expose it to a loss." (CARP Report at 95). SESAC is also an

stations would have paid more than KTRU is not relevant, as more stations would have paid less.

Recordkeeping, and Reports of Use.

99. CBI has filed extensive comments in the recordkeeping and reports of use proceedings before the Copyright Office, and has already incorporated them by reference in this proceeding. It is therefore unnecessary to detail the problems with the current Interim and proposed regulations as they apply to Educational Stations in this testimony.

100. If the CRB recognizes that Educational Stations are a distinct sub-group and creates recordkeeping for this group that are reasonable and feasible, the transactional costs for the copyright owners and performers will diminish significantly, as there will be significantly less data to receive and process on behalf of Educational stations from filed reports of use and more money to disburse to the royalty recipients. If the CRB does not enact recordkeeping rules specific to Educational Stations, that mirror or are no more burdensome than those of Section 253.5(e), then the marketplace value for the flat fee will drop accordingly.

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experienced and sophisticated negotiator.

Terms, other than Recordkeeping and Reports of Use

Presently Section 263.3 reads,

> "A Noncommercial Licensee shall in every respect be treated as a 'Licensee' under part 262 of this chapter, and all terms applicable to Licensees and their payments under part 262 of this chapter shall apply to Noncommercial Licensees and their payment, except that a Noncommercial Licensee shall pay royalties at the rates applicable to such a 'Licensee,' as currently provided in Sec. 261.3(a), (c), (d) and (e) of this chapter, rather than at the rates set forth in Sec. 262.3(a) through (d) of this chapter."

101. With one exception, this is appropriate, provided there are no proposed changes to §§262.4, 262.5 or 262.6.

102. The exception is that, due to the nature of the Educational Stations, in particular with respect to staff and management churn, it is necessary for these stations to receive some form of triggering communication to remind them of the need to pay the royalties. The PROs all generate invoices for Educational Stations. SoundExchange, even after requests from CBI, has refused to generate an invoice or to even acknowledge receipt of funds paid by services.

103. One explanation of the refusal of SoundExchange to generate a communication reminding services of their obligation to pay, is the need for the service to calculate payment on the Statement of Account. It would be a simple matter for SoundExchange and any other designated agent to simply send a blank statement of account to Services that have already provided Notice of Intent to Use the Statutory License, as required by regulation for new services, and to send one from their database of existing services.

104. Failure to follow basic and standard business practices in this matter puts the Educational Stations in the precarious position of becoming infringers, due to lack of

payment, even when they were unaware that payment was due and received nothing from the Designated Agent(s).

Certification

Except as noted, I have personal knowledge of the facts in this testimony and the foregoing is true and correct to the best of my understanding.

Dated: October 26, 2005

William C. Robedee
Chair, Collegiate Broadcasters, Inc.

Appendix III

Direct Testimony of
Joel R. Willer

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C. 20540

In the Matter of:	)	
RATE SETTING FOR	)	
DIGITAL PERFORMANCE RIGHT	)	**Docket No. 2005-1 CRB DTRA**
IN SOUND RECORDINGS AND	)	
EPHEMERAL RECORDINGS	)	

DIRECT TESTIMONY OF JOEL R. WILLER

I, JOEL R. WILLER, testify as follows:

1. I am a tenured Assistant Professor of Mass Communications and Faculty Supervisor of student-operated radio station KXUL at the University of Louisiana at Monroe ("ULM"). I have been employed as a member of the faculties of institutions within the University of Louisiana System since 1982, and as part of my duties I have been responsible for the supervision of KXUL radio since 1985.

2. I presently co-chair the Legislative Liaison committee of College Media Advisers, Inc. ("CMA") and serve as Adviser to the Chair of Collegiate Broadcasters, Inc. ("CBI"). I formerly served on the Executive Board of Directors (1995) and the Faculty/Staff Advisory Board (1996-1998) of the National Association of College Broadcasters ("NACB").

3. In 2003, I received the Reid H. Montgomery Distinguished Service Award from CMA, for work without which "many college stations' Internet presence – for many of them their only presence – would have been silenced." In 2002, CMA named me a Distinguished Four-Year Broadcast Adviser. In 2001, I received two awards from the Interactive Multi-Media Division of the Broadcast Education Association, for Web site development.

4. I served as a CBI representative on the task force investigating reasonable recordkeeping policies for noncommercial Webcasters, established through an agreement between SoundExchange, Inc. and various noncommercial services under the Small Webcaster Settlement Act of 2002 ("SWSA").[1]

5. On behalf of the University of Louisiana at Monroe and radio station KXUL I participated in the recordkeeping roundtable hearing for statutory digital sound recording performance licenses conducted on May 10, 2002, by the U.S. Copyright Office and a subsequent recordkeeping status conference on July 15, 2002; submitted written testimony to the U.S. Senate Committee on the Judiciary hearing "Copyright Royalties: Where is the Right Spot on the Dial for Webcasting" (May, 2002); and authored written comments to the U.S. House of Representatives' Subcommittee on Courts, the Internet, and Intellectual Property with regard to online digital music issues relevant to the Copyright Act, pursuant to a March 12, 2002, request.

6. I was the author of a paper entitled Music Performance Licensing in the Digital Age, presented at the professional continuing education program "The Fusion of Arts and Entertainment" organized by the Arts, Entertainment, Media and Sports Law Section of the Louisiana State Bar Association (February 25, 2005). I was the author of the cover article "New Possibilities for College Webcasters: The Evolution of Copyright Royalty Policy," published in College Media Review (Vol. 41, No. 3, Summer 2003). I was the author of the article "The Impending Demise of Internet Radio" for Performing Songwriter magazine, exploring the impact on artists from the new digital sound recording performance royalties to be paid by noncommercial Webcasters (December, 2002).

7. I have been a frequent presenter at national and regional college media conferences for NACB, CMA, and CBI.

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[1] 68 Fed. Reg. 35011 (June 11, 2003), at ¶ (7.)(b).

8. I hold a Bachelor of Science (B.S) degree in Speech-Telecommunications and a Masters in Education (M.Ed.) degree in Theoretical Foundations, both from Kent State University. I first became involved in student-operated radio in 1977, at Kent State's unlicensed AM carrier current station WKSR.

I. Introduction.

9. This testimony specifically addresses the characteristics of and sound recording performances by Educational Stations.[2]

10. In the only previous royalty rate proceeding related to the Section 112 and 114 statutory licenses, absolutely no evidence was presented to describe Educational Stations.[3] The arbitration panel itself lamented the paucity of information in the record related to nonexempt digital retransmissions by non-CPB funded, non-commercial educational broadcasters:

> Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations ("non-CPB broadcasters") presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. […] The record tells little about those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those that are not.[4]

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[2] For the purposes of this testimony, the use of the term "Educational Stations" refers to all services that are directly operated by, or are affiliated with and officially sanctioned by, and the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a "public broadcasting entity," as defined in 17 U.S.C. § 118(g), qualified to receive funding from the Corporation for Public Broadcasting ("CPB") pursuant to the criteria set forth in 47 U.S.C. § 396. Further, these services are exempt from taxation under Section 501 of the Internal Revenue code, have applied for such exemption, or are operated by a state or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

[3] The Copyright Arbitration Royalty Panel in the previous proceeding noted that only the National Religious Broadcasters Music License Committee ("NRBMLC") presented testimony related to some noncommercial radio stations not funded by CPB; however, the only witness proffered by NRBMLC was an officer for a large commercial company. *Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9, CARP DTRA 1&2 (2002), at p. 90 ("CARP Report"). The Librarian's determination stated that, "The only witness who testified on behalf of [NRBMLC] was Joe Davis, who works for a commercial broadcaster, and had only anecdotal information concerning noncommercial stations. Because of his lack of expertise in this area, the Panel did not credit his testimony." 67 Fed. Reg. 45259 (July 8, 2002).

[4] CARP Report, at p. 89.

This omission would clearly incorporate Educational Stations that retransmit programming from licensed over-the-air radio stations, as well as unlicensed Educational Stations that originate programming exclusively for digital transmission.

11. This testimony will present specific information describing the digital retransmissions by Educational Station KXUL at the University of Louisiana at Monroe. Where appropriate, I will generalize the KXUL information to other Educational Stations, based on my experience spanning more than two decades of working with such stations across the nation. Through this analysis, the royalty Board will receive information related to the universe of Educational Stations that heretofore has been lacking in the record.

II. Background of Student-Operated Radio Station KXUL.

12. ULM is a regional four-year state-assisted public institution of higher education with a population of approximately 9,275 students as of the spring of 2005, is located in the northeastern portion of the state of Louisiana, and offers a broad array of academic and professional programs through the doctorate degree. KXUL, a noncommercial educational radio station, obtained its first broadcast license from the Federal Communications Commission in 1973. KXUL is staffed principally by student volunteers and is administered by the academic Department of Communication within the university's College of Arts and Sciences. Mass Communications students may receive academic credit for their involvement with the radio station; however, students with a variety of majors participate in the operations of KXUL, and many student volunteers at the station do not have professional aspirations in radio or broadcasting.

13. A 1999 Accrediting Council on Education in Journalism and Mass Communications accreditation review listed among the strengths of the ULM Mass Communications academic program an "[o]utstanding student radio station." The accreditation report also generally recognized the value of students' co-curricular involvement with KXUL in augmenting classroom instruction.

14. Funding for the operation of KXUL is derived exclusively from student activity fees levied by a popular vote of the ULM student body; KXUL receives no state funding, no direct financial support from the ULM general fund, and no federal funding from CPB. By federal regulation, KXUL cannot air advertising on its over-the-air broadcasts. One member of the Mass Communications faculty serves part-time as the station's supervisor. A small number of student staff members receive part-time work-study wages at the present federal minimum of $5.15 per hour. The majority of the KXUL staff is comprised of volunteers. The KXUL student staff presently numbers fewer than one dozen students in total. KXUL has no full-time employees.

15. KXUL broadcasts programming 24 hours each day, 365 days of the year.

16. Radio station KXUL is a member of both CBI and the Intercollegiate Broadcasting System, organizations participating in this proceeding on behalf of Educational Stations.

17. The University of Louisiana at Monroe is the licensee of another noncommercial educational radio station, KEDM, which is an affiliate of the National Public Radio and Public Radio International networks. This second station receives a portion of its funding from CPB and enjoys a full-time staff of six employees, as well as a number part-time employees and community volunteers. The operations of KEDM and KXUL are completely separate, and the stations share no staffing or funding.

18. KXUL launched its first Web site in 1996. The station began the digital non-subscription retransmission its over-the-air programming via the Web on July 2, 1998, utilizing free audio streaming software made available by RealNetworks, Inc. The station added a second Web audio streaming service, consisting of the same over-the-air programming, utilizing a newer version of RealNetworks' free server and encoder software on June 6, 2000. A third audio streaming format, Windows Media, was added by KXUL on January 24, 2001 utilizing server software bundled with the academic version of the Microsoft Windows 2000 Server operating system. On September 7, 2005, the oldest two KXUL Web audio streams were replaced with streams served using free software provided by Nullsoft, Inc. (SHOUTcast), owned by America Online, Inc., and free open source software by Apple Computer, Inc. (Darwin Streaming Server).

19. KXUL's Web retransmissions predate the effective date of the Digital Millennium Copyright Act of 1998 (October 28, 1998), and the station has continuously maintained one or more retransmission streams of its over-the-air programming since that date.

20. KXUL provides all of its own audio streaming and Web services, software and hardware. The amount of traffic KXUL can service with its Web audio streams is restricted because of the limited network bandwidth the radio station shares with the rest of the university campus. For the KXUL Web audio streams, I have personally assembled all of the computer hardware, installed and configured all streaming software, and written some applications in the attempt to comply with statutory requirements.

21. KXUL's Web retransmissions are ancillary to the station's over-the-air service. The station's Web retransmissions are accomplished by no- or very-low-cost software, and the station pays for no network bandwidth.

22. Digital files of sound recordings are not played by KXUL directly from any Web audio streaming encoding or serving computer; instead, KXUL encoding software receives the same audio signal sent to the station's analog over-the-air transmitter. The Web audio streaming computers utilized by KXUL do not and cannot log sound recording meta data, such as artist name, song title, album title, marketing label, and the like.

23. During the calendar year 2004, the most recent year for which complete data is available, the combined KXUL Web streams provided just 25,725.36 total aggregate hours of connected client computers.[5] Based on a 365-day year, this total time averages 2.94 connected client computers per hour during each 24-hour day.

24. Each month during the same time span experienced at least one session exceeding 24 hours in length. Individual sessions as long as 135.53 hours (5.65 days) were reported during that year in the KXUL Web audio streaming server access logs. The previous CARP Report defined a "performance," on which the arbitration panel's proposed royalty rate scheme was wholly based, as "[e]ach instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (*e.g.* the delivery of any portion of a single track from a compact disc to one listener)…"[6] KXUL cannot through its Web audio streaming server access logs differentiate between client computer connections and actual listenership; this phenomenon is common to most services performing sound recordings, if not all. Clearly, lengthy sessions recorded in a Web audio streaming server access log are not synonymous with the measurement of listenership. The term "Aggregate Tuning Hours," introduced in the CARP report,[7] does not have the same meaning as "Aggregate Listening

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[5] This figure was determined by an access log analysis program I wrote, requiring several hundred hours of personal time, to parse the various Web audio streaming server access log formats used by KXUL.

[6] CARP Report, at p. 108.

[7] *Id.*, at p. 110.

Hours." Any sound recording performance royalty scheme reliant on the length of connections as reported in Web audio streaming server access logs of necessity will be fraught with substantial error at the expense of licensees. In the case of Educational Stations such as KXUL, with relatively low levels of Web audio streaming utilization, the error introduced by just a few such reported lengthy sessions will be massive because of the large relative proportion of the prolonged sessions when compared to the aggregate lengths of all connections.

25. Likewise, as has been established *supra*, the KXUL Web audio streaming servers technologically cannot document sound recording meta data because sound recordings are played back by KXUL through systems entirely independent of the Web audio streaming technology. Therefore, KXUL cannot technologically determine the number of listeners, or even connections, to any given sound recording. I reiterate here that the various commercial and open source Web audio streaming software packages used by KXUL are the very same as are widely used by many other services, including the universe of Educational Stations.

26. The KXUL Web audio streaming server access logs record the identity of the client computer using dotted numeric Internet Protocol addresses. The station does not have the ability to universally resolve these addresses to the respective destination country; therefore, the figures for the KXUL aggregate computer connections listed above are inflated by an indeterminate number of destinations in foreign countries, for which a domestic statutory royalty would not apply.

27. A portion of the KXUL aggregate computer connections listed above are attributable to the playback of material generated entirely by the station, for which KXUL itself owns all copyrights, and for which statutory royalties are not due. KXUL does not have the capability to segregate in its Web audio streaming server access log analysis software data

describing connections to its broadcast retransmissions from data describing connections to material not subject to the statutory royalties.

28. In my work to develop a software application to analyze Web audio streaming server access logs I have discovered that accesses by some automated spider/crawler/robot programs, used by outside parties to index or confirm the availability of Web audio streams, are reported in access logs in the same manner as would be the case with a client computer used by a person. Such spider/crawler/robot programs are plentiful and accesses are frequent. Accesses by spider/crawler/robot programs, which in no way represent listening by persons, should not be considered "performances" in the context of the statutory sound recording digital performance license, despite the false indications to the contrary common in the server access logs.

29. Media research firm Arbitron, Inc. estimates that, as the fall 2004, the KXUL Average Quarter Hour ("AQH") over-the-air audience was approximately 300 persons.[8] During the previous five-year period the KXUL over-the-air AQH audience fluctuated somewhat, reaching as high as 700 persons. AQH is a roughlty equivalent unit of measurement for the KXUL over-the-air audience as is the aggregate computer connections listed above for the station's Web audience, except that AQH is measured for just 18 hours each day and the Web audio streaming server access log data includes all hours each day.

30. The comparison of the KXUL Web audio streaming server access log data to the Arbitron data for the KXUL over-the-air audience reveals that the station's Web service is truly secondary to its over-the-air presence. The KXUL Web audio streaming audience appears to be less than one percent of the station's over-the-air audience.

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[8] This figure is based on Arbitron's audience measurement of the Monroe, Louisiana, Total Survey Area by all persons aged 12 years and older, for the listening period from Monday through Sunday, 6 a.m. until Midnight – the broadest figures provided by Arbitron.

31. My communications with other Educational Stations reveal that most do not have access to the type of detailed Web audio streaming data provided *supra* for KXUL. Of the Educational Stations that, like KXUL, provide Web audio streaming services in-house, most do not have software to analyze server access log data or do not have the technical expertise to install such a software application. Other Educational Stations rely on campus information technology departments, often physically separated from the program origination studio, to provide Web audio streaming services and the stations do not have access to server access log data, or the Educational Station's streaming data might be intermixed with unrelated media requests. Still other Educational Stations make use of third party providers of Web audio streaming services; while many commercial streaming providers provide server access log analysis tools, some do not.

32. Most Educational Stations I have encountered can indirectly gauge the number of their Web audio streaming connections by one of three methods: 1) the software employed can be configured to restrict the maximum simultaneous connections to a specified number, or the number of simultaneous connections is otherwise limited by the software developer; 2) the available bandwidth for the Web audio streaming service is limited, either technically or by contract, to a specific maximum amount; or 3) some streaming server software applications provide built-in tools for easily providing the instantaneous number of a Web audio stream's client connections, but to not easily allow for historical tracking of the number of client connections. Educational Stations with which I have dealt that use any of the above methods to estimate the peak number of their Web audio streaming connections generally report figures in the very low double digits, at most. The exceptions exceeding these figures are almost universally for the limited times during which an Educational Station transmits a play-by-play

broadcast of a sporting event, programming which makes little or no use of sound recordings subject to the statutory royalty. Again, such estimates describe only the number of an Educational Station's peak Web audio streaming client connections; the average number of connections would naturally be lower.

33. Like KXUL, other Educational Stations can only judge the number of Web audio streaming connections and cannot determine the number of actual listeners to digital sound recording transmissions.

III. Application of the Librarian's Previous Determination.

34. The Librarian's determination of the Section 114(f) statutory performance royalty rate, subsequent to the previous arbitration proceeding, for the digital performance of sound recordings as a retransmission of an over-the-air FM broadcast station such as KXUL was 0.02¢ per performance.[9]

35. The Librarian's previous determination, and the arbitration panel's recommendation on which it was based, did not properly reflect the fact that some Educational Station Webcasters do not simulcast broadcast stations licensed by the Federal Communications Commission. All Educational Stations share the relevant characteristics cited by the Librarian to qualify these services for deferential statutory royalty rates,[10] regardless of whether they might simulcast a licensed broadcast station or whether they might originate programming specifically for digital transmission over the Web.

36. The Librarian's previous determination of the Section 112(e) statutory ephemeral recording royalty rate was 8.8% of the total performance royalty.[11]

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[9] 37 C.F.R. § 261.3(a)(2)(i).
[10] 67 Fed. Reg. 45258 (July 8, 2002).
[11] 37 C.F.R. § 261.3(c).

37. The Librarian's previous determination allows for an estimate of 12 performances per Aggregate Tuning Hour for simulcasts by broadcast stations.[12]

38. Again, the Librarian's previous determination contained no information relative to the Educational Station willing buyer in a hypothetical marketplace.

39. Services cannot ascertain the number of listeners to a Web audio streaming connection, as that term was used in the Librarian's determination to define "Aggregate Tuning Hours" and "Performance."[13] Services might only be able to establish the number of client computer connections to a Web audio streaming server; as has been demonstrated *supra*, such connections might exist even when a reasonable conclusion can be made that no listening has occurred.

40. Notwithstanding KXUL's inability to verify the number of listeners to its Web audio streams, application of the combined performance and ephemeral recording royalties in the Librarian's previous determination to the 25,725.36 total aggregate hours during which client computers were connected to the station's streams during 2004, as has been described *supra*, results in a total royalty of $67.17 for that year. This theoretical royalty is overstated as a result of the factors also discussed above.

41. The Librarian's determination subsequent to the previous arbitration proceeding specified a minimum annual fee of $500 for services such as KXUL.[14]

42. Reversing the mathematics from the $500 minimum annual fee, KXUL would pay a performance royalty of 0.15¢ per performance for the calendar year 2004 under the Librarian's previous determination, plus the 8.8% ephemeral recording royalty. This effective royalty would

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[12] 37 C.F.R. § 261.3(b).
[13] 37 C.F.R. § 261.2.
[14] 37 C.F.R. § 261.3(e)(1).

be more than twice the rate previously established for commercial services,[15] and more than seven times the stated performance royalty rate for simulcasts by non-CPB funded, noncommercial broadcasters. The effective royalty KXUL would pay under the Librarian's previous determination would therefore substantially exceed his best guess of a hypothetical marketplace rate upon which a willing Educational Station buyer and a willing seller would come to agree.

43. The establishment of a minimum fee is required by the statute.[16] The previous arbitration panel concluded that the minimum fee should serve two purposes: 1) to ensure that the license administrator's costs not exceed royalties received, and 2) to reflect the intrinsic value of a service's access to the full blanket license.[17]

44. As long as the above two purposes are satisfied, the minimum annual fee should not serve to discriminate between or to dissuade services seeking to make use of the statutory license, such as a minimum annual fee that would have the effect of establishing a "buy in" level high enough to financially exclude small services like Educational Stations.[18]

45. The previous panel used the lowest minimum annual fee negotiated by single commercial service to recommend a statutory minimum fee it believed satisfied both of these purposes.[19]

46. For Educational Stations, a more appropriate benchmark for the amount of a minimum annual fee sufficient to satisfy the purpose of ensuring that the license administrator's costs not exceed royalties received can be found in the statutory Section 118 licenses applicable

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[15] 37 C.F.R. § 261.3(a)(1).

[16] 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B).

[17] CARP Report, at p. 95.

[18] The CARP Report appropriately noted, "In the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors." *Id.*, at p. 24.

[19] CARP Report, at p. 95.

to royalties paid by noncommercial broadcasters to musical works performance rights societies. The Section 118 fees, by nature, already account for the salient characteristics of Educational Stations, unlike the commercial agreement used as a reference in the previous determination. For an Educational Station over-the-air broadcaster, present Section 118 annual royalties for ASCAP and BMI are each $262, and for SESAC the annual royalty is $85.[20] The transaction costs for any Section 112 and 114 license administrator should be no more than similar costs for any single Section 118 license administrator; therefore, the lowest statutory annual royalty established for the Section 118 licenses should be sufficient to ensure that the license administrator's costs not exceed royalties received. The $85 annual statutory royalty presently paid to SESAC by Educational Station over-the-air broadcasters consequently is the best indicator of the value for a minimum annual fee from Educational Stations that ensures the license administrator's costs not exceed royalties received.

47. I assume that sophisticated and experienced negotiator SESAC would not agree to a royalty that would expose it to a loss, just as the previous panel assumed in its examination of minimum fees for the sound recording licenses negotiated by the Recording Industry Association of America ("RIAA").[21] Access to the entirety of the joint proposal leading to the specification of the Section 118 royalties is not necessary to reach this conclusion.[22]

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[20] 37 C.F.R. § 253.5(c) as amended by 69 Fed. Reg. 69822 (December 1, 2004).

[21] "Whichever the purpose of the minimum fee requirement, the Panel believes that the lowest fee negotiated by RIAA under the per-performance fee model would necessarily cover the perceived administrative costs and the value for access to the blanket license. This belief is premised upon one fundamental assumption – that a sophisticated and experienced negotiator, such as RIAA, would not negotiate a minimum fee that would expose it to a loss. We are quite comfortable with this assumption." CARP Report, at p. 95.

[22] The previous panel cited a Librarian caveat to reject the Section 118 royalty amounts as a basis for the sound recording digital performance royalty rate: "[T]he Librarian recognizes that the joint proposals do not reflect any assessment by any of the parties of the absolute or relative value of the right of the performance of music in the ASCAP, BMI or SESAC repertory by college radio stations…." 62 Fed. Reg. 63502 (December 1, 1997). CARP Report, at p. 90. Here, the Section 118 royalty is not used to establish the "absolute or relative value," but to separately ascertain the appropriate amount of a minimum annual fee that ensures the license administrator's costs not exceed royalties received. The license administrator's assumed transaction cost should be independent of the negotiating position of either of the parties; either the transaction cost is covered or it is not. Even for an agreement

48. Because the Section 118 royalty paid by Educational Stations is a flat fee, the $85 annual statutory royalty presently paid to SESAC by Educational Station over-the-air broadcasters represents both a minimum annual fee and a maximum. That fee amount is large enough to both cover the license administrator's transaction costs and to provide some amount of net proceeds for the copyright owners; if the musical works flat royalty fee were only sufficient to cover the license administrator's transaction costs, this statutory license would be worthless to the copyright owners. Therefore, the amount of the SESAC annual flat royalty fee obviously exceeds the minimum amount that should be necessary to ensure that the license administrator's costs not surpass royalties received. The SESAC Section 118 royalty has the additional weight of credibility due to the longevity, particularly in contrast to the Librarian's sound recording digital performance royalty determination.

49. Another perspective on minimum annual royalties by Educational Stations sufficient to cover the license administrator's transaction costs can be provided by voluntary campus agreements offered by the musical works performance rights societies. Each of the three performance rights societies offer such agreements, which license performances through Educational Stations' Web audio streaming services in addition to a wide range of performances in, at, or by educational institution classrooms, student unions, auditoriums, stadiums, theatre groups, orchestras, bands, fraternities/sororities, socials, and more. The present SESAC minimum annual campus license fee is $198.[23] Although the lowest Section 118 license fee discussed *supra* represents the most appropriate benchmark for the minimum annual fee to be applied here to Educational Stations, the SESAC voluntary campus agreement also demonstrates

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containing a no-precedent clause, the assumption can be legitimately made, for the limited consideration of the minimum fee, that the seller would not agree to a rate that would expose it to a loss.

[23] A copy of each of the ASCAP, BMI, and SESAC campus performance licenses is appended to the direct statement for which this testimony has been provided.

that a minimum fee much lower that was established in the previous proceeding should be sufficient to ensure the license administrator's costs not exceed royalties received.

50. I am unaware of any copyright agreement currently in effect between any Educational Station and copyright owners and musicians, collectively, for the digital performance of sound recordings, other than the single agreement subsequent to the SWSA which cannot be considered in this proceeding. In the absence of any voluntarily negotiated agreement between Educational Stations and copyright owners and musicians for the digital performance of sound recordings, the musical works campus performance agreement provides the only perspective, in addition to the Section 118 licenses, of marketplace rates and terms voluntarily entered into by Educational Stations for digital performances.

51. The transaction costs for a license administrator to manage both the Section 112 and 114 royalties from a single service should be no more than the same costs evaluated individually under each of these statutory sections; therefore, the minimum annual royalty inclusive of both the performance and ephemeral recording licenses should not be stepped up because here two licenses are simultaneously administered, merely to assure that the license administrator's costs not exceed royalties received.

52. The CARP Report included no discussion of any deliberations to determine the intrinsic marketplace value specific to Educational Stations of access to a full statutory blanket license. The commercial agreement cited in the CARP Report for the establishment of the previous minimum annual royalty was in no way indicative of a hypothetical marketplace rate to which a willing Educational Station buyer would come to agree.

53. Totaling the minimum fees of the three voluntary campus agreements offered by the musical works performance rights societies, in similar manner to the Librarian's previous

attempt to proxy the intrinsic value from Internet licenses by performance rights societies,[24] would overstate the estimate of the intrinsic value for Educational Stations of statutory sound recording digital performance license.[25] Web audio streaming by Educational Stations is but a small proportion of the value of each of the voluntary campus agreements, which primarily license performances unrelated to the Educational Stations. The $653 total of the three voluntary musical works campus agreements is immediately useful only to set a far outside boundary above which a minimum annual fee would most certainly exceed the intrinsic value to Educational Stations. Because of the *de minimis* contribution of the Educational Stations' Web audio streaming performances to the overall cost of the voluntary musical works campus agreements, the high outside endpoint for the minimum annual fee used to estimate the intrinsic value of the license should actually be much lower than this total.

54. In each of the three voluntary musical works campus agreements an educational institution does not pay any additional royalty when it performs works via Web audio streaming than would be the case if the institution streamed no performances at all. Put slightly differently, an educational institution that offers Web audio streaming pays no greater musical works royalties under the voluntary campus agreement than does an educational institution that does not offer Web audio streaming and has no interest in doing so. Further, in each of the three voluntary musical works campus agreements, an educational institution pays the same royalty regardless of the number of independently programmed Web audio streaming channels it offers. One program channel, three, or a dozen, and the educational institution still pays the same money under each of the three voluntary musical works campus agreements. Both of these factors

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[24] 67 Fed. Reg. 45259 (July 8, 2002).

[25] The 2005-2006 Consumer Price Index-adjusted minimum annual fee for ASCAP is $231. The 2005-2006 indexed minimum annual fee for BMI is $224. The stated 2005-2006 minimum annual fee for SESAC is $198. The total of the three minimum annual fees is $653.

provide strong evidence of the intrinsic value of these Internet licenses to Educational Stations, and are also indicative of the intrinsic value of the licenses at issue in the instant proceeding. Although not suggesting a specific intrinsic value for the licenses, these indicators do solidly imply that the intrinsic marketplace value of the sound recording licenses is much less than the hypothetical minimum transaction cost for the license administrator; therefore, the $85 annual Section 118 statutory royalty presently paid to SESAC by Educational Station over-the-air broadcasters provides the most appropriate benchmark for the combined minimum annual royalty fee for Educational Stations under the Section 112 and 114 licenses. In no event should the combined minimum annual royalty fee for Educational Stations under the Section 112 and 114 licenses exceed the $198 amount of the SESAC minimum annual fee under the voluntary musical works campus agreements.

IV. Terms Not Addressed in the Previous Rate Determination.

55. The three voluntary musical works campus agreements apply equally to all Web audio transmissions by an educational institution, regardless of the amount of listening to these transmissions. The Librarian's determination, on the other hand, applied his non-CPB funded, noncommercial royalty rate only to the retransmission of a licensed noncommercial broadcast station. As introduced *supra*, each of these two types of Educational Stations fulfill the conditions appropriate for a deferential royalty rate.

56. The statute stipulates that this Board is to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" (emphasis added).[26] The statute also requires this Board to "establish requirements by which copyright owners may receive reasonable notice of the use of

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[26] 17 U.S.C. § 114(f)(2)(B).

their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings."[27]

57. Neither the previous CARP Report nor the Librarian's determination makes reference to any consideration that the specific implementation of requirements for the statutory notices of use might impact the marketplace monetary value of the statutory license. I can only speculate as to why that might have been the case, but I assume that it was because of any combination of: 1) the nascent services negotiating licenses with the collective nominally representing copyright owners and performers did not recognize the ramifications of a costly requirement for statutory notices of use, 2) services negotiating the referenced licenses already employed systems and technology sufficient to allow for the relatively easy compliance with any potential complex requirement for statutory notices of use, 3) services negotiating the referenced licenses were sufficiently large and well financed that the incremental cost of adapting to any potential complex requirement for statutory notices of use, no matter how punctilious, was of comparatively little consequence, and/or 4) small services with established operational systems and legacy technology such as most Educational Stations were not represented in the proceeding. For student-operated radio station KXUL and for the myriad Educational Stations with which I am familiar, the prospect of burdensome requirements for complicated statutory notices of use of sound recordings substantially lowers the marketplace value, intrinsic and overall, of the statutory license.

58. At the advent of the statutory license for the digital performance of sound recordings I expected the ultimate requirement for statutory notices of use, at least for Educational Stations, to look very much like the regulations previously established for

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[27] 17 U.S.C. § 114(f)(4)(A).

reasonable notices of use under the Section 118 licenses.[28] This same belief was shared at the time by all Educational Stations with which I communicated. Our mutual expectation was based on the clear fact that the statutory language for the Section 114 license was in all meaningful respects identical to the statutory language requiring notices of use under Section 118, and we have expected new regulations to follow the recognized precedent.[29]

59. At this writing, complete regulations to enact the statutory notices of use of sound recordings have yet to be established, despite a protracted rulemaking proceeding to do so. My personal longstanding involvement in that separate proceeding has made me keenly aware of the real potential for that proceeding's outcome to considerably deflate the marketplace value of the statutory sound recordings license as applied to Educational Stations, because of the far-reaching requests of the collective nominally representing copyright owners and performers. For the Educational Station "willing buyer," the yet-to-be-established notice of use regulations are of as great a concern as are the monetary royalties to be paid under the statutory sound recordings license. Should regulations be adopted for sound recording notices of use at all approaching what has been requested by the collective nominally representing copyright owners and performers, the statutory license, for Educational Stations, will have virtually no marketplace monetary value. The notice of use regulations, because of the predictable impact on the monetary value of the statutory licenses, are terms relevant in the instant proceeding.

60. A significant amendment in the statute since the previous rate determination proceeding is the change in jurisdiction over establishing requirements for the notices of use. At

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[28] 37 C.F.R. § 253.5(e) states, in its entirety, "*Records of use.* A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports."

[29] In relevant part, 17 U.S.C. § 118(b)(3) states that this Board must "establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities."

the time of the last determination, the responsibility for establishing requirements for the notices of use rested with the Librarian; now that rulemaking is a responsibility of this Board. This adjustment in the statute changes radically at least one conclusion of the previous panel:

> Thus, it is evident that the Panel is bound to adopt those terms which the record shows would have been agreed to by willing buyers and willing sellers in the marketplace. The question of whether such terms represent the optimum alternative from the standpoint of administrative convenience and workability is not part of the governing standard for the Panel, nor is it a matter on which we have either record evidence or institutional expertise. Accordingly, while the Panel would not readily adopt terms which are obviously unworkable, and has not done so here, we must defer to the expertise of the Librarian the final evaluation of the administrative feasibility of terms which willing buyers and willing sellers would agree to in marketplace negotiations.[30]

With the transfer of responsibility for the requirements for notices of use, this Board now also is responsible for the final evaluation of the administrative convenience and feasibility of all terms prescribed. Further, the record of the previous proceeding did not contain any evidence of notice of use terms upon which a willing Educational Station buyer would agree.

61. Most Educational Stations have not been subject to the notice of use regulations previously partially adopted by the Librarian, specifying interim requirements for sound recording meta data elements to be retained, because these services have been exempted from all reporting by a non-precedential agreement under the SWSA. Educational Stations hoped for a replacement accord with sound recording copyright owners and performers in advance of this proceeding, but that outcome has not yet been forthcoming. Therefore, Educational Stations face a daunting prospect in the proposed requirements for notices of use.

62. The previous panel noted the appropriateness of a transitional period to allow services to adjust to the establishment of a royalty fee metric necessitating changes in service

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[30] CARP Report, at p. 129.

operations or technology.[31] The panel provided a 30-day transitional period from the effective date of the rates and terms prescribed. The Librarian's determination redefined the transitional period to extend for 30 days following the adoption of rules establishing requirements for the notices of use.[32] Because Educational Stations have not yet been subject to any requirements for notices of use, these stations still require a significant transition period to adjust to any yet-to-be-established requirements for notices of use, if requirements for Educational Stations more stringent than used for the performance rights societies are instituted. Further, the 30-day period contemplated by both determinations would be altogether inadequate in length for Educational Stations because the required changes to systems and procedures would not be trivial.

63. Software to produce the records of use as proposed by the collective nominally representing copyright owners and musicians does not presently exist and most Educational Stations do not possess computer hardware on which to run such contemplated software. Once a format delivery specification is established, software authors would need to assess such requirements and formulate a development plan, write and test the application, prepare documentation, and perform any training and support for the software. Educational Station student volunteers would have to identify the software solutions most appropriate for their individual circumstances, procure funding, acquire and install the software and any necessary hardware, create a sound recording meta database or backfill any existing database, and train all student volunteers in the use of the contemplated system. This process could be complicated by the requirement to integrate the contemplated new system with any existing technology systems

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[31] "Some services may not currently possess the proper software, or technical expertise, to track or calculate accurately their performances of sound recordings." CARP Report, at p. 109. "The Panel believes services should be accorded more reasonable notice to acquire the requisite software and technical expertise to begin accurately tracking performances. And although the record does not support any particular timeframe, we view 30 days as reasonable." *Id.*

which might be variously implemented at Educational Stations. I do not believe the software alone could be developed within a 30-day period. From my previous experience with implementing pre-existing commercially-released music scheduling software and digital sound recording storage systems at Educational Stations, I optimistically estimate that the process would take a minimum of six months to implement from the time software becomes available, and more realistically one year from the time software becomes available.

64. The potential notice of use regulations are collectively such a significant marketplace valuation factor for Educational Stations, perhaps appreciably distinguishing them from many other services, because the prospective financial and human costs to comply with would-be complicated regulations could be monumental in the context of the size of the Web audio streaming audiences of these stations. Educational Stations share additional issues with other broadcast services, including the fact that long-established operational practices and technology employed by Educational Stations and broadcasters are very different from the practices and technologies of newer services representing new industries, and these broadcaster characteristics are not conducive to the type of elaborate requirements requested by the collective nominally representing copyright owners and performers. For Educational Stations that simulcast over-the-air programming via Web audio streaming, like other broadcaster-simulcasters, the ancillary nature of the digital transmissions does not justify the disruptive retooling of primary operations.[33]

65. A brief description of further aspects of student-operated KXUL, supplemented with generalized comments explaining Educational Stations, will help clarify these assertions.

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[32] "Instead, the rule shall require that a Service begin accounting for each performance in accordance with the rules and regulations regarding Records of Use 30 days after the effective date of final rules." 67 Fed. Reg. 45260 (July 8, 2002).

66. First, KXUL schedules the musical sound recordings it airs using the MusicMaster software application provided by A-Ware Software, Inc.[34] The version of the MusicMaster software used by KXUL is written for the DOS operating system. A-Ware does offer a version developed for the Windows operating system, but KXUL continues to utilize the legacy software for three principle reasons: 1) the Windows-based software interestingly does not yet offer key features vital to the principle operations of KXUL, 2) the station cannot justify the significant expenditure of limited volunteer student personnel resources in order to effect a transition to the Windows-based product, and 3) the station cannot justify the financial expense of acquiring the new software. A-Ware continues to offer and support the DOS-based version of MusicMaster, which suggests this version is still in wide use by other stations. The inherent limitations of this version of MusicMaster would make difficult the implementation of the type of requirements requested by the collective nominally representing copyright owners and performers.[35] This existing software clearly is not now capable of providing such reports, nor is all of the proposed sound recording meta data presently entered by the KXUL student staff into the application.

67. Second, KXUL sound recordings are stored and played back by a separate broadcast-type VaultXpress studio system provided by Broadcast Electronics.[36] The KXUL VaultXpress system is relatively new – the system has been on-air for just over one year – yet it

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[33] The information provided *supra* provides background of the size of Educational Stations' Web audio streaming audiences and is also clearly indicative of the magnitude of the secondary nature in the context of simulcasters.

[34] The great majority of Educational Stations do not use such music scheduling software; most often, individual Educational Station program producers choose musical selections at the time the broadcast is performed.

[35] As just one example, the size of the various MusicMaster data fields is finite. The program allows a maximum of 35 characters each for the artist and song title fields, 64 characters for the album title field, and 10 characters for the marketing label field. The unabridged information for one sound recording presently aired by KXUL is "The Willing Well II: From Fear Through the Eyes of Madness" (song title, 58 characters), by Coheed and Cambria (artist, 18 characters), on the compact disc Good Apollo, I'm Burning Star IV, Volume One: From Fear Through The Eyes Of Madness (Explicit) (album title, 94 characters), released by Equal Vision/Columbia (marketing label, 21 characters). The collective nominally representative of copyright owners and performers has proposed a regulation for the notice of use that would not allow for the use of abbreviations in such situations.

[36] Many Educational Stations do not employ such a digital storage system, but instead programming practices characteristic of Educational Stations often rely on sound recordings played back from various native media.

still has fundamental limitations in the context of the proposed requirements for notices of use.[37] As has been explained *supra*, an audio output signal from the VaultXpress traverses to the various KXUL Web audio streaming encoding computers; sound recording data files are not transferred to any encoder or server computer and sound recording meta data is not reported in any Web audio streaming server access log.

68. In order to produce the type of notice of use requested by the collective nominally representing copyright owners and performers, several KXUL systems would be required to be radically altered and great amounts of data would need to be backfilled by a limited number of student volunteers.

69. The MusicMaster scheduling software alone could not provide the proposed reports, because this system does not contain information of the number of client computer connections. Any attempt to associate MusicMaster sound recording meta data with the multiple KXUL Web audio streaming server access logs would most certainly generate errors significant enough to render this great effort meaningless, primarily because the only way to attempt to connect the multiple forms of data would be by time of day. Internal system BIOS clocks in computers, which provide time data recorded in Web audio server access logs, are notoriously bad at maintaining reliable time; I have noted relative time discrepancies between KXUL computers as great as 20 minutes. Therefore, any attempt to marry MusicMaster sound recording meta data with each of KXUL's several Web audio streaming server access logs would undoubtedly result in sound recordings being credited with inaccurate client connection data. Further, the MusicMaster software is only aware of the time at which a particular sound recording is scheduled to be performed; the predictably unpredictable nature of live broadcast performances

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[37] Again using just the field length limitations as an example, the VaultXpress allows a maximum of 40 characters for each the artist and song title fields, but does not provide either album title or marketing label fields.

will result in variations from this scheduled time. The actual performance time of each sound recording would only be available to the VaultXpress system.

70. Web audio streaming servers log client computer accesses only once and only at the conclusion of each session. For a client computer session lasting 24 hours, a simulcasting service would need to retroactively associate the meta data of approximately 288 sound recordings with the single server access log entry. In the case of KXUL, which is not unusual among services operating under the broadcast station model, multiple software applications authored by unassociated developers would need to interact across at least three computer platforms to accomplish this difficult task.

71. This short explanation confirms that to comply with the sound recording notice of use requirements requested by the collective nominally representing copyright owners and performers, KXUL would need to make massive changes to several technical systems in addition to expending great amounts of student labor in the complicated effort.[38] KXUL literally would be forced to rebuild its entire studio infrastructure to report performances to an average of fewer than three simultaneous client computer connections each hour.

72. For Educational Stations at which the Web audio streaming server computers are not geographically collocated with studio facilities, or for such stations not making use of a digital storage system for sound recordings, the challenge would be immensely greater than for KXUL.

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[38] The reality for KXUL and other Educational Stations belies the impression given to the previous panel by the collective nominally representing copyright owners and performers that "currently available software allows the generation of a performance report that 'truly is the push of a button.'" CARP Report, at p. 107. Had such a statement been accurate, the rulemaking proceeding to specify requirements for statutory notices of use of sound recordings could have been completed long ago.

73. The burden for Educational Stations would not be proportionate to the Web audio streaming audience size that characterizes these stations; therefore, the marketplace value of the statutory sound recording digital performance license would be diminished greatly.

V. Fee Metric Considerations.

74. In the previous rate determination, the panel thoroughly considered only two types of fee metrics, a percentage-of-revenue option and a per-performance option.[39]

75. For reasons similar to one explanation the previous panel provided for its preference to not adopt the percentage-of-revenue option,[40] that metric is obviously not an appropriate choice for Educational Stations because these services are not, by definition, operated to generate any profit.

76. The specification of a per-performance fee metric, on the other hand, creates several major issues of practicality, particularly in the case of Educational Stations. The previous panel reported that "a per-performance metric 'is directly tied to the nature of the right being licensed.'"[41] While a fee tied to the performance of a sound recording to each individual listener at first blush appears intrinsically logical, in practice Web audio streaming services cannot measure listeners.[42] Web streaming services can measure only the number of client computer connections, as was introduced *supra*. The Librarian's determination partially recognized this infirmity of the specification of a fee structure based on the measurement of listenership, when the Register recommended and the Librarian adopted a clarification that the term "listener" is to be used to reference connected client computers even if one or more persons are listening to each

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[39] CARP Report, at p. 36.

[40] *Id.*, at p. 37.

[41] *Id.*

[42] The previous panel cited as the basis of its conclusion testimony by Adam Jaffe, Professor of Economics, Brandeis University and Chair of the Department of Economics and the Chair of the University Intellectual Property

connection.[43] Even the Register and Librarian evidently failed to consider that no persons might be listening when a client computer is connected to a Web audio streaming service, or that not all client computer connections are subject to the statutory royalty. Further, given the nature of computer usage by persons, which is typically a solitary activity, it is much more likely that no persons might be listening to a connected client computer[44] than it is that multiple persons might be listening to a single connection. Because of the relatively low levels of overall listening common to Educational Station Web audio streams, client computer connections not representing listening by persons or not subject to this royalty[45] can falsely inflate these services' reported "performances" by very large factors.[46]

Policy Committee. As an economist, Prof. Jaffe might not have been aware of the technical limitations precluding the direct measurement of listeners to Web audio streams.

[43] "*Definition of 'Listener'*. The definitions of 'Aggregate Tuning Hours' and 'Performance' both include references to a 'listener' or to 'listeners.' It is not clear from the text of these definitions whether each person who is hearing a performance is a 'listener' even if all the persons hearing the performance are listening to the same machine or device (*e.g.*, two or more persons listening to a performance rendered on a single computer). Clearly the intent is that all persons listening to a performance on a single machine or device constitute, collectively, a single 'listener,' because 'listener' is used here to assist in defining what constitutes a single performance. Indeed, it would be difficult to implement an interpretation that counted all individuals in such circumstances as separate 'listeners.' Accordingly, the Register recommends including a definition that provides that if more than one person are listening to a transmission made to a single machine or device, those persons collectively constitute a single listener." 67 Fed. Reg. 45270 (July 8, 2002).

[44] *e.g.*, when a computer has been left connected but unattended, as is a common occurrence with today's preponderance of always-on Internet connections. Such a scenario was much less prevalent at the time the record was developed in the previous rate setting proceeding than is the case today.

[45] As described *supra*, such connections might include, among others, extremely long sessions, sometimes lasting days at a time; connections destined to client computers outside the United States and not subject to this statutory royalty; or connections by automated spider/crawler/robot programs, used by outside parties to index or confirm the availability of Web audio streams. The previous panel did note that some sound recording transmissions (those comprised of works not copyrighted) do not constitute performances subject to the royalty, but the panel did not specifically address non-domestic transmission destinations. "[W]e define a 'performance' as: Each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (*e.g.*, the delivery of any portion of a single track from a compact disc to one listener) but excluding the following: (1) A performance of a sound recording that does not require a license (*e.g.*, the sound recording is not copyrighted)…." CARP Report, at p. 108.

[46] The previous panel reported that the use of a per-performance metric should ensure that the more intensely a service performed sound recordings, the more that service would pay in royalties. CARP Report, at p. 37. However, because the per-performance metric has been transmogrified, through its application, into a per-connection model, this selection in practice means that the more intensely client computers are connected to a Web audio stream, even if the connections do not constitute "listening" subject to the statutory license, the more the service could be wrongly required to pay in royalties.

77. Web audio streaming server access log data does not directly measure listenership ("what is truly being licensed"[47]), as the previous panel apparently assumed or was lead to believe, but merely serves as a different sort of proxy for listenership – and not a very accurate one at that. The previous panel expressed its preference, between the two metrics considered, partially based on the wrong conclusion that one model (percentage-of-revenue) represents a proxy for listenership and that with the other (per-performance) direct measurement of listenership is feasible.[48] For the digital performance of sound recordings via Web audio streaming, the direct measurement of listenership simply is not possible; therefore, the per-performance metric – or, more accurately, the per-connection metric – should not be given any preference over other fee metrics, including those that might not have been considered by the previous panel, that might also represent proxies for the measurement of the use of sound recordings.

78. Significant is the difference between measuring the number of client computer connections[49] to Web audio streams versus measuring the number of client computer connections to sound recordings, the performance of which is being licensed. For some services subject to this statutory license (chiefly, most commercial Webcasters), the technology employed might make for very little distinction between measuring the number of connections to a Web audio stream versus the number of connections to a sound recording; however, for broadcast simulcasters (which include some Educational Stations) and for Webcast-only Educational Stations that emulate the broadcast operational model (which include the balance of Educational Stations) there is an immense distinction because programming is produced utilizing technical systems totally separate from the Web audio delivery systems. The literal measurement of the

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[47] CARP Report, at p. 37.
[48] *Id.*

number of listeners to a Web audio stream is impossible; the association of the number of client computers connected to an Educational Station's Web audio stream with meta data describing each sound recording performed by that station is merely very difficult and extremely expensive.[50] The adoption of a fee metric that would require Educational Stations to associate information in this manner would also have a profoundly negative impact on the marketplace value of this statutory sound recording digital performance license for those stations because the services' transaction costs would most probably exceed the marketplace value of the rights that are being licensed.

79. A further revision of the per-performance fee option – replacing the "per-sound recording connection" metric, as was arguably the true effect of the Librarian's determination, with a "per-stream connection" fee metric – could somewhat reduce the transaction costs for Educational Station performances because the change would moderate by a bit the amount of data necessary to make payment, but the cost to exchange the massive amounts of data necessary to execute such a transaction would still most probably exceed, for each the Educational Stations and the license administrator, the true marketplace value of the rights that are being licensed and would therefore negatively impact on the marketplace value of this statutory sound recording digital performance license.

80. The previous panel's selection of a presumed per-performance fee metric was not without qualification. "For these reasons, the Panel concludes that, where feasible to utilize, a per-performance fee metric is highly preferable to a percentage-of-revenue structure or to a per-hour fee structure…" (emphasis added).[51] This selection was apparently made under the theory that direct measurement of listenership (as opposed to client computer connections) to each

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[49] As is distinguished from the measurement of the number of listeners.

[50] See the discussion of sound recording notice of use requirements in the foregoing section.

sound recording performance is feasible, which in practice it is not. Even the measurement of connections to each sound recording performance by Educational Stations is not economically feasible to utilize, and therefore for these services fails the previous panel's criteria. The panel did not scrutinize the feasibility of either of the considered fee metrics in the context of Educational Stations, which constitute "willing buyers" very different from the services described in the record of the previous proceeding. Finally, other fee metrics exist that might be considered, and might be more feasible for Educational Stations.

81. One of the additional fee metrics that might be considered, for Educational Stations, is the enrollment-based fee metric found in each of the three voluntary musical works campus agreements. However, such a fee metric would not work for the statutory licenses under consideration here in the same way that it works in those campus agreements. The principle purpose of the campus agreements is to license performances occurring on the physical premises of each educational institution. The size of the in-person audiences for these performances can be reasonably assumed to be in proportion to the size of the enrollment of the corresponding institution. In the case of Web audio streaming by Educational Stations, because there is no physical presence by the audience required, there is absolutely no correlation between the size of the educational institution's enrollment and the size of the associated Educational Station's Web audio stream audience. The Educational Station competes for the attention of the universe of online listeners along with all other Web audio streaming services worldwide, noncommercial and commercial, regardless of the physical location of the competing services or would-be listeners; on-campus Web listeners can as easily connect to an off-campus service as they can to the local Educational Station. Merely because a parent institution is characterized by a relatively large enrollment, the Web audio stream audience for that institution's Educational Station cannot

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[51] CARP Report, at p. 38.

be assumed also to be large. Therefore, the size of an educational institution's enrollment would in no way serve as an appropriate proxy for the sound recording digital performance royalty to be paid by Educational Stations.

82. A flat-fee royalty has as one of its major advantages very low relative transaction costs, for seller and buyer alike. For instance, unlike the any of the variations of the per-performance metric, which require the exchange of large quantities of data to complete each transaction, the flat fee license can be administered with very little effort by either party. The transaction costs of the per-performance metric do not scale well for services making comparatively few performances.[52] A fee metric where the royalty payment is entirely consumed in transaction costs obviously makes no sense in the theoretical marketplace. For these reasons, the flat-fee royalty can be very appropriate in a situation where the absolute value of the performances to be licensed is small and the level of utilization is low, such as with Educational Stations, and where the administrative complexity of alternative fee metrics results in transaction costs greater than the total absolute value of the aggregated licensed performances. For the low-use services, a flat-fee royalty can assure that the license administrator's transaction costs do not drive up the royalty above the theoretical marketplace value for the willing Educational Station buyer. Likewise, the flat royalty fee can also assure that the services' transaction costs do not exceed the marketplace value of the license.

83. The flat-fee royalty has precedent in the previous sound recording digital performance rate setting proceeding. The Yahoo! agreement, upon which the previous determination was ultimately based, calculated the Section 112 ephemeral royalty based on a flat fee – and also resulted in the largest ephemeral royalty amount.[53] The flat-fee royalty under the

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[52] See the discussion *supra* regarding the notice of use of sound recordings.

[53] CARP Report, at p. 100.

Section 118 licenses also serves, if not as a benchmark for the royalty amount, as an example of the application of this fee metric. The Section 118 licenses also provide a precedent for the use of a different fee metric for Educational Stations (the flat-fee royalty) in comparison to commercial services (commercial broadcasters formerly paid under the percentage-of-revenue metric for musical works).

84. The disadvantage of the flat-fee royalty is that some Educational Stations would pay more than the total marketplace value of their aggregate performances, while others would pay less than the total marketplace value of their aggregate performances. However, it is probable that, with a properly crafted flat rate structure, the Educational Station that would overpay would still pay less than the combined royalty and transaction costs under the per-performance metric.[54] The properly crafted flat-fee rate structure for Educational Stations would not be based on the theoretical marketplace value for the services with the greatest amount of utilization, but would be based on the average Educational Station; the copyright owners and performers would receive an undue windfall if a flat-fee royalty were based on the maximum amount of utilization by any Educational Station. Restated, the flat-fee royalty should not be set large enough so that the marketplace value of performances by each and every Educational Station would be less than the flat fee, but should be set to approximate the average marketplace value of performances across the universe of Educational Stations.

85. A license administrator might argue that the transaction cost economies of the flat-fee royalty for Educational Stations would not be achievable because detailed information is required to be exchanged along with each transaction in order to permit the distribution of royalties collected, even if such information is not necessary to determine the royalties to be

paid. Such an interpretation can only be made while ignoring the precedent of 37 C.F.R. § 253.5(e), which was previously adopted in response to statutory language that is in all consequential respects indistinguishable from the statutory language requiring notices of use under Section 114. For several decades statutory license administrators have been able to distribute royalties from Educational Stations under the reasonable 37 C.F.R. § 253.5(e) notices of use; license administrators wishing to acquire additional proxy information upon which to make royalty distributions have done so as a normal cost of doing business, as is proper in a marketplace exchange.[55] Further, the administrator(s) of the sound recording digital performance license will have in their possession, at no cost to them,[56] data from other Web audio services, making use of extraordinarily broad sound recording playlists, that can serve as effective proxy data to help facilitate the distribution of Educational Stations' royalty payments. Sound recording license administrator(s) will have no-cost access to high quality proxy data from services other than Educational Stations. Because other Web audio services perform from far-reaching repertoires of sound recordings, and because these services aggregate much larger audiences than do Educational Stations, the use of information from the other services as proxy data would lead to the reasonably accurate and efficient distribution of royalties from Educational Stations. High transaction costs of alternative fee metrics applied to Educational Stations would result in a lower net amounts of royalties, if any royalties at all would remain, to be distributed to copyright owners and performers. Therefore, under the flat-fee royalty metric,

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[54] For any Educational Station for which this assumption might prove not to be true, such a service could optionally and appropriately instead elect to pay sound recording digital performance royalties under alternative royalty metrics that might be adopted for other services.

[55] As just one example, BMI recently acquired BlueArrow^{SM} digital audio pattern recognition technology capable of measuring performances on radio, television, and the Internet. For license administrators like BMI, such data acquisition does not represent a sunk cost of royalty distribution, but separately becomes a saleable product in the marketplace. BMI has formed a wholly owned subsidiary, Landmark Digital Services, LLC, to commercially deploy and exploit the BlueArrow technology.

notice of use regulations precisely parallel to 37 C.F.R. § 253.5(e) could be adopted for the digital performances of sound recordings by Educational Stations.

86. Besides the preference for a metric which was assumed to allow for the direct measurement of the use of the copyrighted sound recordings, of the three factors cited by the previous panel for its decision,[57] the other two issues principally served to disqualify from consideration the percentage-of-revenue metric clearly not appropriate for Educational Stations, and those issues are therefore not addressed further here.

87. Given the totality of circumstances for Educational Stations, the flat-fee royalty metric is the most feasible of the various options. This is not to suggest that this same fee metric should be adopted for all services subject to the sound recording digital performance license. The flat-fee royalty for Educational Stations would simultaneously satisfy for Educational stations the statutory requirements to establish minimum annual royalty fees.

88. A very elementary allegory might serve to vividly illustrate the underlying economics of the per-performance metric in the context of Educational Stations: The sale of nails by a hardware store. One choice the hardware store manager might consider would be to price each nail by the piece – after all, that pricing structure is most directly tied to what is being sold. A homeowner seeking to buy nails to complete a weekend project, upon entering the store and seeing the posted prices for nails and the requirement that the buyer painstakingly count out and meticulously report to a cashier the exact quantity of each type of nail to be purchased, must decide whether the transaction is, for his meager needs, worth his time and effort to count the nails as the merchant has demanded, or whether to buy his wares from a business offering a pricing structure more appropriate to the deal. Should the do-it-yourselfer choose to proceed

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[56] Indeed, any data provided by the services digitally performing sound recordings has marketplace value independent of royalty administration that should be fairly considered in this rate setting proceeding.

with the purchase at our subject store, a cashier must then, tally by tally, go through to confirm the individual count for each type of nail selected. The store manager soon finds that his employees are spending so much time checking out customers like our handyman that his costs to sell the nails are more than the nails are worth. The manager might then decide to stop selling nails altogether. He might decide to sell nails only to the very few large corporate building contractors that already have, or because of their level of capitalization and volume of business can financially justify acquiring, a costly machine to mechanically count the nails and automatically enter the resulting information directly into the store's cash registers. "After all," the store manager says, "It's the buyer who wants the nails. The store shouldn't be expected to shoulder any cost of completing the sale. We should not be asked to reprogram our cash registers to sell nails by the pound, as the customers have requested. We've already spent a lot of money on our cash registers. Besides, nail counting machines are readily available." The store manager also does not want to change his pricing structure because his nail inventory is on consignment and his suppliers would like to be sure they are paid for each and every nail sold. Meanwhile, the hardware store across the street does sell nails by the pound, and soon all the town's handymen are buying their nails there rather than succumbing to the hassle of shopping at our subject store. To remain competitive in the marketplace for all potential customers, our hardware store manager must accept that his business will have overhead costs and that he must relent, reprogram his cash registers, sell nails by the pound, and work with his nail suppliers to come up with an alternative to the per-piece wholesale pricing of nails. That is the marketplace. He might also continue selling nails by the piece to those customers for which that scheme makes sense. In the case of a statutory license, curtailing the sales of nails or ceasing to sell nails to some customers is not an option for the merchant, nor do customers have a choice of hardware

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[57] CARP Report, at p. 37.

stores from which to buy nails. Nevertheless, the purpose of a statutory license is to replicate the theoretical marketplace where our handyman can buy nails by the pound; because, the cost of selling nails by the piece will not make economic sense for all types of customers, since the cost of the transaction can predictably exceed, for buyer and seller alike, the real-world value of the nails. Deciding the market-appropriate price to charge per pound of nails is then a separate issue.

89. Perhaps a more appropriate marketplace analogy for the flat-fee license most appropriate to Educational Stations would be the Chinese restaurant buffet. Not all buffet diners eat the same amount of food, all pay the same price, and yet the restaurateur is able to realize a reasonable overall net profit.

V. The Rate Determination.

90. The previous panel noted a strong preference for using as a rate benchmark any available agreements actually negotiated between services and copyright owners in the relevant marketplace, given comparable circumstances.[58]

91. Some Educational Stations have negotiated direct licenses with individual record companies or copyright owners, often without any requirement for the payment of royalties in consideration of the promotional value of Educational Station performances. However, I do not believe any blanket agreements have been struck during the voluntary negotiating period with the collective nominally representing copyright owners and performers. The differences between Educational Stations and commercial services are not insignificant; these differences are great enough to make any voluntary agreements negotiated between copyright owners and commercial services wholly unreliable as evidence of what an Educational Station buyer would agree to

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[58] *Id.*, at p. 43.

pay.[59] The previous panel intimated that, in the absence of comparable voluntary agreements – which, in this case, most definitely appears to be the situation – theoretical models based on voluntary agreements in other markets can be considered.[60]

92. If any voluntary agreement were to exist between the collective nominally representing copyright owners and performers and an individual Educational Station or group presenting itself as representative of such stations, consideration should be given as to whether the negotiating playing field has been a level one. Educational Stations individually and collectively do not have the legal and financial resources necessary to adequately match the savvy and experienced negotiators of the RIAA and/or SoundExchange.

93. The record of the previous panel suffers major infirmities in its attempt to justify a sound recording digital performance royalty rate for Educational Stations.[61] Because of the deficiencies of that record, the Librarian's rate determination should not be considered precedential here for Educational Stations.

94. Because of the present lack of negotiated agreements with Educational Stations to benchmark the statutory rate applicable to these stations, a theoretical economic model now becomes the only alternative.

95. The previous panel discarded a theoretical economic model which attempted to establish a rate benchmark for uses of sound recordings by non-CPB funded, noncommercial stations, and which was based on the Section 118 musical works royalties paid by such

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[59] The previous panel cited an even earlier arbitration panel determination that "commercial license rates can not appropriately be used as a benchmark to determine Public Broadcasters' rates" (emphasis in original). *Id.*, at p. 89, citing *CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding*, 63 Fed. Reg. 49823.

[60] "[T]he Panel concludes that the 26 RIAA license agreements constitute the next closest approximation of the hypothetical market. If analysis determines that a reliable benchmark can be gleaned from these license agreements, the Panel should look to that benchmark rather than the Webcasters' theoretical model, which attempts to deduce a rate through a series of assumptions drawn from a marketplace far removed from the one envisioned in this statute" (emphasis added). CARP Report, at p. 46.

noncommercial stations. This decision was rendered upon consideration of no-precedent clauses in those voluntary agreements.[62] For this reason, I will not now propose a theoretic model making use of the Section 118 license as a rate benchmark.

96. The only other performance agreements voluntarily entered into in the marketplace with Educational Stations are the campus agreements offered by the three musical works rights societies. These agreements address the same right (performances), buyers (Educational Stations), and medium (Web audio streaming) as are at issue here; however, these agreement admittedly involve different sellers and works. While an agreement more closely matching the marketplace at issue here would be ideal for use as a benchmark, such a perfect agreement does not exist.

97. The three voluntary music works campus agreements do not contain no-~~compete~~ precedent clauses; therefore, under the precedent suggested by the previous panel a rigorous examination of the circumstances of these agreements should not be necessary and the agreements should speak for themselves.[63]

98. Among the key provisions of relevance here, common to all three of the voluntary music works campus agreements, are: 1) the definition of the term equivalent to "Educational Station" is much simplified in comparison to the non-precedential agreement subsequent to the SWSA,[64] 2) an Educational Station is not required to report which copyrighted works are

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[61] CARP Report, at p. 89.
[62] *Id*., at p. 90.
[63] *Id*.
[64] The definition of "Educational Stations" expressed *supra* in this testimony is closely modeled after the language of the non-precedential agreement subsequent to the SWSA, merely as an attempt to avoid controversy. My use of that detailed definition should not be construed to indicate my complete endorsement of this language.

performed via its Web audio stream,[65] and 3) an educational institution pays the same royalty regardless of the number of independently programmed Web audio streaming channels it offers.

99. The voluntary campus musical works agreements have generally been negotiated over a long period of time and serve established historical standards. Only the Web audio streaming portion of those licenses involves performances in a relatively new medium.

100. The voluntary campus musical works agreements each use a royalty fee metric based on campus enrollment. As has been established *supra*, the enrollment-based fee metric is not appropriate for a performance license that covers each Educational Station alone. The theoretical economic model must therefore apply the campus agreements to interpret the theoretical marketplace value of the flat-fee royalty metric most appropriate for Educational Stations.

101. Should Educational Stations be required to provide sound recording digital performance notices of use more burdensome that has been specified by 37 C.F.R. § 253.5(e), the theoretical economic model must factor in that negative impact on the marketplace value of these licenses. The voluntary campus musical works agreements require no reports of use; therefore, a theoretical economic model based on the campus agreements must adjust the marketplace value downward in the case of a burdensome requirement here for notices of use.

102. The theoretical economic model must respect the precedent of the Section 118 rates that have historically determined that Educational Stations are subject to performance royalties lower than has been applied to other non-CPB funded, noncommercial stations.[66]

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[65] The BMI voluntary music works campus agreement does require the reporting of musical works by non-CPB funded, noncommercial broadcast stations, whose over-the-air performances of musical works are included in the campus agreement. Under this agreement, non-CPB funded, noncommercial broadcast stations may be asked to provide sample reports of use similar to the requirements of 37 C.F.R. § 253.5(e). A non-CPB funded, noncommercial broadcast station that simulcasts over the Internet must so indicate on its report of use. A Web-only station has no requirement to provide any report of use.

103. No proceeding has definitively established the relative value of the musical works statutory performance license in comparison to the sound recording statutory digital performance license; therefore, the theoretical economic model will assume that the two works are equally valued.

104. To establish the theoretical marketplace value for digital sound recording digital performances by Educational Stations, the royalty fee amount for each voluntary musical works performance campus agreement in the year preceding inclusion of the Internet performance right should be subtracted from the royalty fee amount for the year during which the Internet performance right was first included. This difference should then be reduced by a factor representing the change in the Consumer Price Index (All Urban Consumers, All Items) ("CPI") for the respective year. This result represents the change in the value of the voluntary musical works performance campus agreement royalty fee attributable to the addition of the Internet performance right. This Internet performance right value would once again be adjusted by a factor representing the change in the CPI, to index the value up to the current year. The sum of the three figures computed for each of the voluntary musical works performance campus agreements would then be used to represent the enrollment-based theoretical marketplace value of royalties to be assessed Educational Stations under the combined Section 112 and 144 licenses. However, this value also must be adjusted, downward and significantly, to account for the fact that the voluntary campus musical works agreements license an unlimited number of independently programmed Web audio streams, which is in contrast to this sound recording digital recording license un der which the separately programmed streams are not licensed in

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[66] Under 37 C.F.R. § 253.5(c), the total present musical works royalty fee payable by noncommercial broadcast stations operated by colleges and universities is $609. Under 37 C.F.R. § 253.6(c), the total present musical works royalty fee payable by other non-CPB funded, noncommercial broadcast stations is $1,092. Educational Stations

bulk. To convert the enrollment-based value to a theoretical marketplace flat-fee value, the sum would be multiplied by the average of the enrollments of domestic higher education institutions.[67] A precise flat-fee value cannot be calculated independent of the resolution of the issue of the negative economic impact of potential onerous requirements for reports of use. Determining the basis for a particular factor representing the reduction of the value of the license attributable to the potential extensive reports of use is difficult, because such a requirement, for Educational Stations, is unprecedented.

VI. Certification.

Except as stated, I have personal knowledge of the facts in this testimony and the foregoing is true and correct to the best of my understanding.

Dated: October 25, 2005

Joel R. Willer
Assistant Professor of Mass Communications
University of Louisiana at Monroe

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therefore pay musical works royalties that are 55.77% of the royalties paid by other non-CPB funded, noncommercial broadcast stations.

[67] Educational Stations might also include services operated by primary and secondary schools. This recommendation for the use of figures for higher education institutions is merely for the sake of expediency, because such a figure would be more easily obtainable. Any resulting discrepancy is likely to be minor because the number of Educational Stations not operated by higher education institutions is estimated to be fairly small.

CERTIFICATE OF SERVICE

I, William C. Robedee, hereby certify that a copy of the foregoing DIRECT STATEMENT has been served this 27th day of October, 2005, by overnight express mail to the following persons identified on the Service List for Docket No. 2005-1 CRB DTRA published by the Copyright Royalty Board on December 20, 2005:

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